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THE INDIAN LAW REPORTS

CALCUTTA SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT AND FROM ALL
OTHER COURTS IN BRITISH INDIA (EXCEPT THE
COURT OF THE JUDICIAL COMMISSIONER
OF OUDH) NOT SUBJECT TO ANY
HIGH COURT.

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THE HIGH COURT,

1911.

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ERRATA.

- Page 1, line 1 (italics), for "*s. 31A*" read "*s. 310A.*"
- Page 20, line 32 (ref.), for "*2 B. & A. D.*" read "*2 B. & Ad.*"
- Page 21, line 14, for "*Stewart Lee*" read "*Stewart v. Lee.*"
- Page 24, line 26, for "sequent" read "subsequent."
- Page 48, line 11, for "to the" read "to be."
- Page 49, line 34, for "be awarded" read "to be awarded."
- Page 115, line 24, for "*Muller & Co.'s*" read "*v. Muller & Co's.*"
- Page 198, line 15, for "*Sonatun*" read "*Sonamoni.*"
- Page 274, line 22, for "constructing" read "construing."
- Page 275, line 12, for "*Banerji*" read "*Banerjee.*"
- Page 309, line 21, for "honorably" read "honourably."
- Page 363, line 8, for "*Harwood Baker*" read "*Harwood v. Baker.*"
- Page 399, last line (ref.), for "*Om. & Ha.*" read "*O'M. & H.*"
- Page 469, line 14, for "nephew" read "nephews."
- Page 529, line 12, for "*Multari*" read "*Muttaki.*"
- Page 538, line 11, for "appellants" read "appellant."
- Page 539, line 4, from bottom, for "respondents" read "appellant."
- Page 705, line 26, for "in" read "on."
- Page 719, line 30, for "in" read "on."
- Page 720, line 10, for "to value" read "value."
- Page 802, line 11, for "plaint" read "the plaint."

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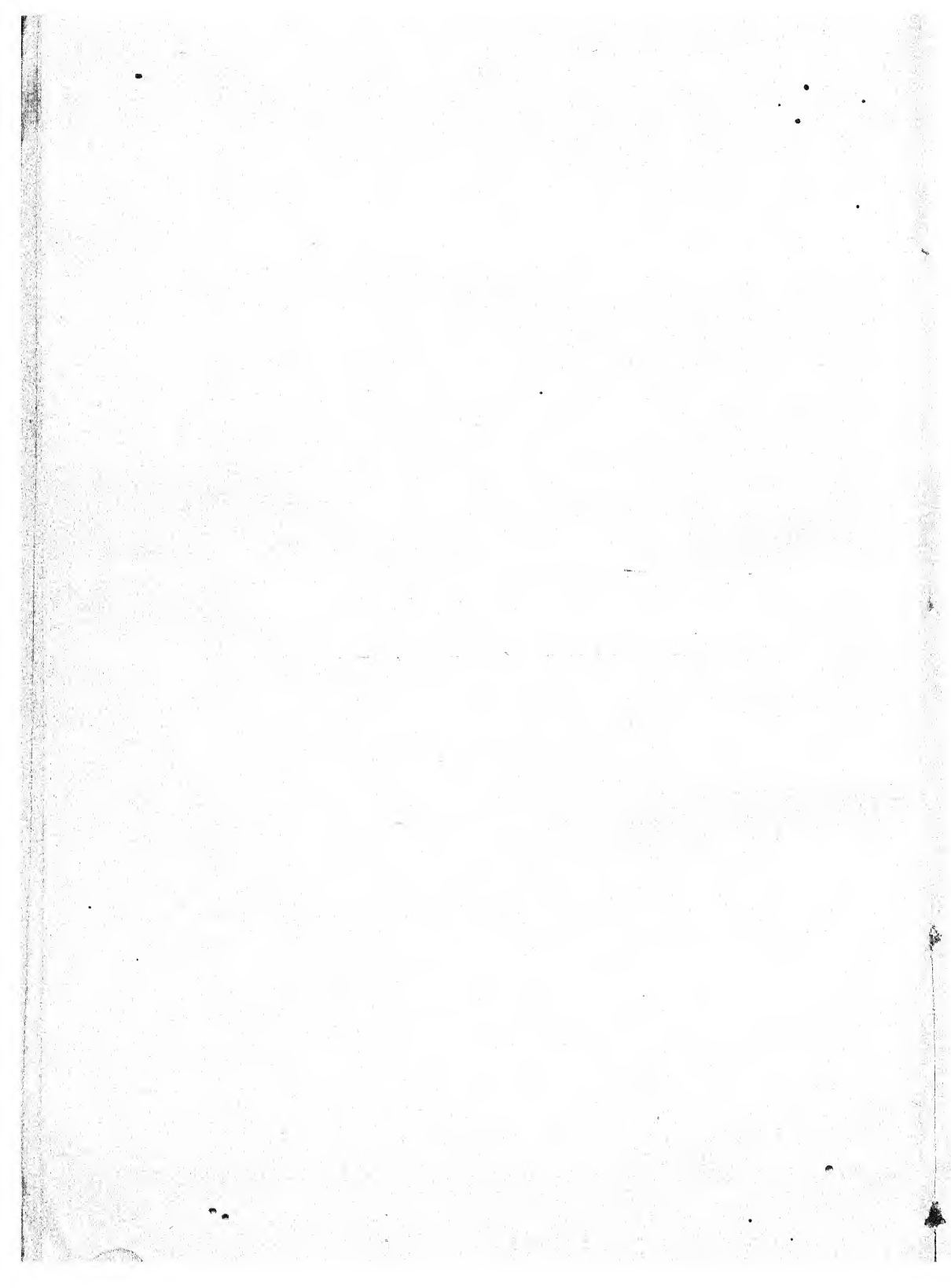


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ERRATUM.

Page 1, line 1 of the head-note (in italics),
for "s. 31A" read "s. 310A."

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LETTERS PATENT APPEAL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Doss.*

SUCHAND GHOSAL

v.

BALARAM MARDANA.*

1910

May 23.

Contribution—Deposit under s. 31 A, Civil Procedure Code by co-tenant, not a party to decree for sale for arrears of rent—Decree, satisfaction of, how becomes complete—Contract Act (IX of 1872) ss. 70, 43, 68, 69, 72, 146, 222—Civil Procedure Code (XIV of 1882) s. 310A.

Where an entire tenure was sold in execution of rent-decrees obtained against only some of the tenants, and a tenant, who was not a party to the rent-suit, deposited, with the approval of the Court and lawfully, the prescribed amounts under s. 310A of the Code of Civil Procedure to have the sales set aside, with the object of protecting his own interest in the holding, and the sales were set aside with the result that the liability of the defendants in respect of rent was discharged:—

Held, that the plaintiff was entitled to sue the several defendants for contribution, each according to his share in the decretal debt only but not in respect of the deposit of 5 per cent. of the purchase-money that the applicant is bound to make under s. 310A, C. P. C.

Per JENKINS C.J. The terms of section 70 of the Contract Act apply to such a case, and, though they are rather wide, they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by

* Letters Patent Appeal, No. 4 of 1909, in Appeal from Appellate Decree No. 404 of 1907.

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contract. But it is incumbent on final Courts of fact to be guarded and circumspect in their conclusions, and not to countenance acts or payments that are really officious.

Venkata Gopalaraju v. Timmayya Pantulu (1) referred to.

Per Doss J. Such a case does not come within the purview of s. 70 of the Contract Act, for the plaintiff must in law be held to have deposited the rent in Court in discharge of his own liability and not in satisfaction of a debt due by another, co-sharer tenants being liable for the rent, not only jointly, but also severally. It was not the intention of the Legislature that section 70 should be invoked where relief might be obtained under any other section of the Act, *e.g.*, ss. 43, 68, 69, 72, 146 or 222. Section 69 is applicable in cases like this.

Smith v. Dinonath Mookerjee (2) discussed.

Damodara Mudaliar v. Secretary of State for India (3) approved of.

Though the plaintiff had no right to make the deposits under s. 310A, C. P. C., as his interest in the holding was not affected by the sales, he being no party to the decrees, the deposits being in fact made without protest from any party or Court, and the joint obligation of all tenants discharged thereby, the mere fact that the money was deposited under s. 310A did not place him in a position worse than if he had satisfied the entire decree before sale, nor did it alter the equitable right of the plaintiff to be reimbursed proportionately for the deposit, the benefit of which was enjoyed by others.

Fatima Khatoon Chowdrain v. Mahomed Jan Chowdry (4), *Dulichand v. Ramkishan Singh* (5), *Johnson v. Royal Mail Steam Packet Co.* (6), *Edmunds v. Wallingford* (7), *The Orchis* (8), *Jugdeo Narain Singh v. Raja Singh* (9) referred to.

In apportioning liability between co-obligees in a suit for contribution, which is eminently an equitable suit, regard must be had more to the real nature of the debt than to the decree founded on it.

Ram Tuhul Singh v. Biseswar Jall Sahoo (10), *Ruaben Steamship Co. v. The London Assurance* (11) referred to.

A decree is not satisfied and the obligation in respect of it is not discharged until the decree-holder receives the money out of Court and satisfaction of the decree is entered; nor does the compulsion of law initiated by the attachment of the property terminate until such satisfaction.

APPEAL by some of the defendants.

Plaintiff was the purchaser of the interest of defendant No. 9, who was a co-tenant in a certain holding with the other

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| (1) (1899) I. L. R. 22 Mad. 314. | (6) (1867) L. R. 3 C. P. 38. |
| (2) (1885) I. L. R. 12 Calc. 213. | (7) (1885) L. R. 14 Q. B. D. 811. |
| (3) (1894) I. L. R. 18 Mad. 88. | (8) (1890) L. R. 15 P. D. 38. |
| (4) (1868) 12 Moo. I. A. 65; | (9) I. L. R. 15 Calc. 656 |
| 10 W. R. P. C. 29. | (10) (1875) L. R. 2 I. A. 131; |
| (5) (1881) I. L. R. 7 Calc. 643; | 23 W. R. 305. |
| L. R. 8 I. A. 93, | (11) [1900] A. C. 6. |

defendants. A co-sharer landlord having an eight-anna interest in the rent of the holding brought two suits to recover rent against the defendants other than defendant No. 9, claiming to be entitled to recover from these persons the whole of his share of rent as representing the entire tenancy interest in the holding. He got two decrees and the holding was sold twice as being the holding belonging to defendants Nos. 1 to 8 as possessors of the entire tenancy interest. The plaintiff subsequently applied in each case under s. 310A to be allowed to deposit the decretal amounts, alleging that the share which he had purchased from his vendor had been sold as the property of the other tenants, and that therefore he was entitled to come in under that section and make the deposits. The deposits were received in both cases and the sales were set aside and the present suit was brought to recover from the defendants Nos. 1 to 8, the money which the plaintiff had paid in on their behalf and for recovery of the costs of the deposit. The defendants contended, *inter alia*, that plaintiff had no right to make the deposits, that his interest, if any, was not affected by the sale and that the payment was gratuitous or voluntary. The Munsif decided the question of title in plaintiff's favour and overruled the pleas in bar taken by the defendants, but it dismissed the suit, holding that the payment of the money by the plaintiff was voluntary. The Subordinate Judge, on appeal, differed from the Court of first instance and held that the plaintiff was entitled to recover the money from the defendants, because, whether or not he had a right under s. 310A of the Code to deposit the money to have the sale set aside, he in fact, did deposit it and in so depositing he did not intend to make the payment gratuitously on behalf of the other defendants, and, therefore, as the defendants had benefited by the payment, the plaintiff was entitled to recover from them the sum which he had paid on their behalf and by which they had been benefited, such payment not being made gratuitously. The plaintiff's claim for recovery of the cost of deposits and interest thereon was, however, disallowed as evidence in respect thereof was not sufficient.

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The second appeal to the High Court was heard by Brett J., and his Lordship agreeing with the conclusions of the Subordinate Judge, dismissed the appeal.

Thereupon the present appeal was preferred, under section 15 of the Charter Act.

Babu Naliniranjan Chatterjea, for the appellants. Plaintiff's right to the property was unaffected by the sale, as he was no party to the decree in execution of which the property was sold. Sale held under a decree obtained by a co-sharer landlord could not and did not affect plaintiff's right: *Narain Uddin v. Srimanta Ghose* (1). Plaintiff could not come under s. 310A, C. P. C., and deposit was therefore not lawfully made. Payment made by plaintiff was not for defendants, if the common obligation subsisted after the sale; if not, then it was made merely for avoiding a fancied risk to his own rights. As to benefit enjoyed by the defendants, there was no option to refuse or accept the benefit. Setting aside the sale might not have been to their benefit, if it had fetched a high price. Assuming that it was a benefit, it was a gratuitous benefit thrust upon the defendants. Then again, it is not in every case in which a man is benefited by the money of another that an obligation to repay arises: *Ram Tuhul Singh v. Biseswar Lall Sahoo* (2). Section 70 of the Contract Act should be carefully applied: *Damodara Mudaliar v. Secretary of State* (3). The liability to contribute does not arise by *contract*, as there was no contract between the parties, or by any *obligation* binding them all to equality of payment. *Ruabon Steamship Co. v. London Assurance* (4). There was no common liability between the plaintiff and defendants after the sale. The debt was a personal one and it was discharged by the sale—at any rate would have been discharged—from sale proceeds. Plaintiff was not interested in the payment of the money, and

(1) (1901) I. L. R. 29 Calc. 219. (3) (1894) I. L. R. 18 Mad. 88.

(2) (1875) L. R. 2 I. A. 131, 143; (4) [1900] A. C. 6, 12.

123 W. R. 305.

defendants were not *bound* by law to pay after the sale, so the case does not come under section 69.

Babu Dwarkanath Mitter, for the respondent. I submit that payment was made by the plaintiff "lawfully" within the meaning of s. 70 of the Contract Act. Although the plaintiff was no party to the suit, yet as a matter of fact the entire holding was sold. The result of the deposit under 310A made by the plaintiff has been that the property has been left in the possession of the defendants 1 to 8 from before and their liability for rent has been discharged. The finding of the Lower Appellate Court, which is the final Court of fact, has been that the plaintiff did not intend to make the deposit gratuitously. The deposit was further made with the approval of the Court. It was therefore done with the sanction of the Court and therefore "lawfully" with the meaning of s. 70. The entire holding was advertised for sale, and although in law the share of plaintiff could not have passed by the impending sale, yet if in these circumstances plaintiff made the deposit, he must have done it under compulsion of law. I rely on the decision of *Fatima Khatoon Chowdrain v. Mahomed Jan Chowdry* (1), *Dulichand v. Ramkishen Singh* (2). I rely also on the case of *Smith v. Dinonath Mookerjee* (3). As the plaintiff believed in good faith that his property was going to be sold and in averting the sale defendants were benefited, it is only just and equitable that defendants should reimburse the plaintiff to the extent to which their liability has been discharged by plaintiff's act.

Cur. adv. vult.

JENKINS C.J. The plaintiff, is by virtue of transfer from the defendant No. 9, a co-sharer to the extent of 1/12th in a *mourasi jama* with the defendants 1 to 8, and has brought this suit to recover from them certain sums of money claimed

- (1) (1868) 12 M. I. A. 55; (2) (1881) I. L. R. 7 Calc. 648;
10 W. R. P. C. 29. L. R. 8 I. A. 93.
(3) (1885) I. L. R. 12 Calc. 213, 217.

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by him from them on account of sums deposited by him under section 310A of the Civil Procedure Code together with costs. The decree in respect of which these sums were deposited, was passed in a suit brought by one of several co-sharer landlords against defendants 1 to 8 alone for rent. In execution of that decree there was a sale and it purported to be of the entire holding notwithstanding the fact that the present plaintiff, one of the co-sharers, was not a party to the suit.

To have the sale set aside the present plaintiff applied to the Court under section 310A and made the prescribed deposits. This was twice done successfully, and the result has been that the holding is in the possession of the plaintiff and the defendants 1 to 8, and the liability of these defendants in respect of rent has been discharged. The lower Appellate Court, reversing the Munsiff, has passed a decree in the plaintiff's favour and this decree has been confirmed by Mr. Justice Brett from whose judgment this appeal has been preferred. The plaintiff rests his case on section 70 of the Contract Act, so it has to be seen whether it falls within the provision of that section. The determination of this question must largely depend on the findings of fact at which the lower Appellate Court has arrived. It has been found by that Court that the plaintiff in making the two deposits did not intend to do so gratuitously, and that the defendants 1 to 8 enjoy the benefit thereof. And seeing that the plaintiff in making those deposits acted with the approval of the Court, what he did was done lawfully. The conditions of the section are thus satisfied, and the only question that remains is to consider what the compensation is that the defendants 1 to 8 are bound to make.

The lower Appellate Court excluded the claim for recovery of the costs of the deposit and interest thereon, and against this no appeal has been preferred. In the circumstances of this case, I think there should also be excluded so much of the deposit as represents a sum equal to 5 per cent. of the purchase-money. On the materials placed before us, it does

not appear whether the amount specified in the proclamation of sale includes anything beyond the rent decreed, and in any event the excess would be so trifling that I think it would not be profitable to direct any inquiry on that point. The result then is that I would vary the decree of the Subordinate Judge and direct that the plaintiff do recover from each of the several defendants, 1 to 8, his proportionate share of the sum of Rs. 293-10-6; which is the sum deposited as representing the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered.

I desire to emphasize that my decision turns on the particular findings of fact of the lower Appellate Court, by which we are bound. The terms of section 70 are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is, however, especially incumbent on final Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious. In this connection the caution enjoined in *Venkata Vijaya Gopalaraju v. Timmayya Pantulu* (1) should be borne in mind. I do not suggest that the lower Appellate Court in this case acted in disregard of this caution; on the contrary I think its findings have worked substantial justice.

Doss J. This appeal arises out of an action for contribution. Defendants Nos. 1 to 8 and the plaintiff are the joint owners of a certain *mokorari jama*. The share of defendants Nos. 1 to 8 in the tenure is 11/12th. Defendant No. 9 was the former owner of the remaining 1/12th which has since passed to the plaintiff by purchase.

A co-sharer landlord of the tenure obtained two successive decrees for his share of the rent against defendants Nos. 1 to 8 only, without making defendant No. 9 a party thereto. In execution of those decrees the entire tenure was twice attached and sold. On each occasion the plaintiff deposited,

(1) (1899) I. L. R. 22 Mad. 314.

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under section 310A of the Civil Procedure Code, 1882, the amount of the decree and costs together with the statutory compensation and had the sale set aside without any objection being raised thereto, either by the decree-holder or by the judgment-debtors.

Plaintiff has now brought this suit to recover from defendants Nos. 1 to 8 in proportion to their respective shares in the tenure, the two sums so paid by the plaintiff.

The defendants Nos. 1 to 8 denied that the plaintiff had any share or interest in the tenure, and pleaded that the payments were voluntary.

The first Court held that plaintiff's title to a 1/12th share in the tenure had been established, but dismissed his suit, on the ground that the defendants were not liable to reimburse the sums paid by him. On appeal, the Subordinate Judge has given the plaintiff a decree for the sums deposited by him in Court with interest thereon at 12 per cent. This Court, on Second Appeal, has affirmed the decree of the Subordinate Judge.

The defendants Nos. 1 to 8 have preferred this appeal under section 15 of the Letters Patent, and it has been argued on their behalf that the payments made by the plaintiff are purely voluntary and hence an action for contribution does not lie. In my opinion, this contention is not valid. In order to test the soundness or otherwise of this contention let us consider in the first instance whether the plaintiff would have been entitled to sue defendants Nos. 1 to 8 for contribution if he had made those payments into Court after attachment but before sale of the tenure. It appears that though the plaintiff was not a party to the decree, yet what in fact was attached was the entire tenure including the share of the plaintiff.

If the plaintiff under those circumstances deposited in Court the amount of the decree, to avert the impending sale, it would be a payment made under compulsion of law, even though, in case the payment had not been made, and the sale had consequently taken place, the sale would not, in law, have passed his share in the tenure.

• The case of *Fatima Khatoon Chowdrain v. Mahomed Jan Chowdry* (1), decided by the Privy Council before the Indian Contract Act IX of 1872, came into force and the case of *Dulichand v. Ramkishen Singh* (2), decided by the same tribunal, after that Act had come into force, clearly recognise this principle.

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In both those cases, the circumstances were such that if the payments had not been made, and the sale had taken place, the rights and interest in the property of the person who made the payment would not have been affected: see also *Johnson v. Royal Mail Steam Packet Co.* (3), *Edmunds v. Wallingford* (4), *The Orchis* (5), *Jugdeo Narain Singh v. Raja Singh* (6).

This rule is also recognised in section 72 of the Indian Contract Act. In the recent case of *Kanhya Lal v. The National Bank of India* (7), which is a suit to recover money paid by the plaintiff to prevent what he alleged was a wrongful sale of his property in execution of a money-decree against a third person, section 72 of the Contract Act was fully discussed and the cases of *Fatima Khatoon Chowdrain v. Mahomed Jan Chowdry* (8) and *Dulichand v. Ramkishen Singh* (2), were cited before the Privy Council. Their Lordships remitted the case to the Court below in order that the appeal to that Court might be heard and decided on its merits. Though there is no express decision on the point in their judgment, their Lordships would not have remitted that case to the Court below if in their opinion the suit, as framed, was not maintainable.

But apart from this, the plaintiff would have been entitled to sue the defendants Nos. 1 to 8 for contribution upon another ground. The plaintiff and the defendants Nos. 1 to 8 are, as I have said, joint owners of the tenure and are jointly and

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| (1) (1868) 12 Moo. I. A. 65; | (5) (1890) L. R. 15 P. D. 38. |
| 10 W. R. P. C. 29. | (6) (1888) I. L. R. 15 Calc. 656 |
| (2) (1881) I. L. R. 7 Calc. 648; | (7) (1910) I. L. R. 37 Calc. 426. |
| L. R. 8 I. A. 93. | (8) (1868) 12 Moo. I. A. 65; |
| (3) (1867) L. R. 3 C. P. 38. | 10 W. R. P. C. 29. |
| (4) (1885) L. R. 14 Q. B. D. 811. | |

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severally liable to their landlords for the entire rent. It is unquestionable that if any co-sharer tenant pays off the entire rent, he is entitled to sue his other co-sharers for contribution. It is true that the plaintiff was no party to the decrees for rent and hence they could not be realised from him in execution; but it is clear that if the defendants Nos. 1 to 8 had satisfied the decrees, they would according to the fundamental principle of equity which, as to contracts in general, is formulated in section 43, para. 2 of the Indian Contract Act, have been entitled to sue the plaintiff for contribution not only in respect of the amount of the arrears of rent, but also in respect of the full amount of the interests and costs. If, on the other hand, the plaintiff had paid to the landlords the full amount of the decrees and costs and the landlords had accepted the same and had entered satisfaction of the decrees, there is no reason why the plaintiff should not have been equally entitled to sue the defendant Nos. 1 to 8 for contribution. If that is so, does the fact that the plaintiff made the deposits under section 310A place him in a worse position? It is perfectly true that the plaintiff had no right to make the deposits he did, under section 310A of the Civil Procedure Code, 1882. He not being a party to the suits and the decrees, the sales in execution thereof could only pass the rights and interest of the defendants Nos. 1 to 8 and his interest in the property would not have been affected by them. But still, the deposits were in fact made and were made without any protest or objection on the part of the decree-holder or the judgment-debtors and the Court received them and applied them towards the satisfaction of the decrees.

It is urged that, as soon as the sale took place, the decree was satisfied and the joint and several obligation in discharge of which the money was paid ceased to exist. I think a clear fallacy lurks in this argument. The decree is not satisfied and the obligation is not discharged until the decree-holder receives the money and satisfaction of the decree is entered, nor does the compulsion of law, initiated by the attachment of the property, terminate until such satisfaction. When the sale

takes place, the purchase-money deposited by the purchaser remains in Court and it is not paid out to the decree-holder until after confirmation of the sale. If, before the sale is confirmed, an application is made under section 310A and purchase-money and compensation are deposited, the money so deposited is applied towards the satisfaction of the decree and, on the sale being set aside, the purchase-money deposited by the purchaser is refunded back to him, and he also receives the additional amount of statutory compensation. It follows therefore that it was the money deposited by the plaintiff which in fact satisfied the decree and discharged the joint obligation, although, under the law, he had no right at that stage, to make the deposit. I am, therefore, of opinion that the mere fact that the money was deposited under section 310A does not alter the rights of the plaintiff; but at the same time he is not entitled to ask for contribution in respect of the statutory compensation of 5 per cent. deposited by him under section 310A of the Civil Procedure Code of 1882, because that sum did not form part of the joint obligation which the parties were by law bound to discharge. If he had paid the sum before the sale, it would not have been necessary to pay this additional amount.

I do not think that the present case comes within the purview of section 70 of the Contract Act. Under the law the co-sharers tenants were not only jointly, but also severally, liable for the rent of the tenure. When, therefore, plaintiff made the deposit in Court, he did so in discharge of his own liability for rent, and not in satisfaction of a debt due by another. In apportioning liability between co-obligees in a suit for contribution, which is eminently an equitable suit, regard must be had more to the real nature of the debt, than to the decree founded on it.

But apart from this, and notwithstanding the apparent generality of the language of section 70 of the Contract Act, it seems to me reasonable to presume that it was not the intention of the Legislature that this section should be invoked where relief might be obtained under any other section of the

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Act, for instance, sections 43, 68, 69, 70, 72, 146 and 222 (in cases of implied agency).

Nor do I think it was the intention of the Legislature by this section to abrogate the well-established and almost elementary rule of law that "it is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises." *Ram Tuhul Singh v. Biseswar Lall Sahoo* (1), *Ruabon Steamship Co. v. London Assurance* (2). A too liberal construction of the section would render the enactment contained in section 69 almost a surplusage, and the qualifying words "who is interested in the payment of the money" entirely nugatory. The particular rule embodied in section 69 would, on such hypothesis, be included in the more general.

The dictum of this Court in *Smith v. Dinonath Mookerjee* (3) that this section includes the payment of money by another, is in conflict with that of the Madras High Court in *Damodara Mudaliar v. Secretary of State for India* (4) and is based upon a much too narrow interpretation of the words of section 69, as not including a case where a person who is bound to pay a certain sum of money is benefited by its payment by another. The words of the section are comprehensive enough to include such a case.

For the foregoing reasons, I am of opinion that the judgment of Mr. Justice Brett should, with the slight variation in dicated above, be affirmed and this appeal dismissed with costs.

*Decree modified.*

S. M.

(1) (1875) L. R. 2 I. A. 131;  
23 W. R. 305.

(2) [1900] A. C. 6, 15.

(3) (1885) I. L. R. 12 Cal. 213,  
217.

(4) (1894) I. L. R. 18 Mad. 88, 92.



## APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

ASAD ALI MOLLAH

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June 6.

*Maintenance allowance—Attachment—Maintenance to a person for lifetime and to her descendants—Assignment of decree for maintenance—Recurring charge—Validity of assignment in respect of arrears or future maintenance—Transfer of Property Act (IV of 1882) s. 6—Civil Procedure Code (Act XIV of 1882) ss. 232, 266—Civil Procedure Code (Act V of 1908) o. 21, r. 16.*

Where a person is entitled to a monthly maintenance allowance under a deed, the allowance can be attached by an execution creditor only after it has become due, that is to say, it cannot be attached prospectively before it has become due.

*Kasheeshuree Debia v. Greesh Chunder Lahoree* (1), *Hari Das Acharjia v. Baroda Kishore Acharjia* (2), *Harris v. Brown* (3) referred to.

Where a claim has been merged in an actual judgment the right under the judgment is assignable, and the nature of the chose in action is generally immaterial.

*Comegys v. Vassee* (4), *Dugas v. Mathews* (5), *Charles v. Hoskins* (6), *Moore v. Howell* (7), *Stewart v. Lee* (8) referred to.

Future maintenance awarded by decree when falling due can be recovered by execution of that decree without further suit and hence the decree-holder in this case was entitled to recover in execution without further suit the allowance as it accrued due.

*Ashtosh Bannerjee v. Lukhimoni Debya* (9) referred to.

APPEAL by Shaik Asad Ali Mollah and another, decree-holders.

\* Appeal from Original Order, No. 25 of 1909, against the order of Raj Krishna Banerjee, Subordinate Judge of 24-Pergannahs, dated Nov. 4, 1908.

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| (1) (1866) 6 W. R. Mis. 64.       | (6) (1860) Iowa 329;     |
| (2) (1899) I. L. R. 27 Calc. 38.  | 77 Am. Dec. 148.         |
| (3) (1901) I. L. R. 28 Calc. 621. | (7) (1886) 94 N. C. 265. |
| (4) (1828) 1 Peter 193.           | (8) (1900) 70 N. H. 181; |
| (5) (1851) 9 Georgia 510.         | 46 At. 31.               |
| (9) (1891) I. L. R. 19 Calc. 139. |                          |



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The plaintiff Banu Bibi brought this suit for partition of her 1/18th share of the properties in dispute and for delivery of possession and for making the partition, taking into consideration the value and the partibility of each property at the time of partition and the convenience and accommodation of the parties; and in case any property was found to be impracticable to partition, for awarding compensation to the parties on that account and other relief. A consent decree was passed on the 18th April, 1901, by which she relinquished her claim to her share and the defendants were ordered to pay Rs. 5 per month for her maintenance during her lifetime and also to pay maintenance to her son and daughter born of her womb; and the amount payable was made a charge on certain specified properties, and that on non-payment for two consecutive months of the arrears the same to carry interest at 6 per cent. per annum from the date of default till the date of realization. On the 25th of August, 1905, the plaintiff assigned her right under the consent decree in favour of Asad Ali Mollah and Maharaj Mandal, who on the 12th December, 1905, as assignees, applied to be substituted on the record for Banu Bibi and prayed for leave to execute the decree. The learned Subordinate Judge refused the application on the ground that no interest passed to Asad Ali Mollah and Maharaj Mandal under the said deed of assignment as the right to future maintenance was not assignable in law. From this decision the assignees appealed to the High Court and the order of the Subordinate Judge was reversed on the ground that the assignment undoubtedly operated to transfer title at least in respect of arrears which had accrued up to the date of assignment and that consequently it could not be said that the assignees were not entitled to be substituted on the record and entitled to execute the decree. The question, however, whether by virtue of assignment the assignees would be entitled to recover such sums as would accrue after the assignment, was left undecided. On the 3rd of June, 1908, the assignees applied for substitution and for leave to execute the decree.

but were opposed by the judgment-debtors. The learned Subordinate Judge decided that the assignment was operative only in respect of sums which had become due on the 25th August, 1905, the date on which the assignment was made, but it was inoperative in so far as it intended to transfer the right of the original decree-holders to realize maintenance, as they fell due from time to time. The decree-holders now appealed against the order to the High Court.

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*Babu Manmatha Nath Mukerji*, for the appellant, contended that the assignment was valid and operative and effectively transferred to the appellant all the rights as given by the decree, inclusive of the right of the decree-holder to realise from the judgment-debtors by execution, the amount of monthly allowance as it fell due *Harris v. Brown* (1), *Haridas Acharjia v. Baroda Kishore Acharjia* (2), *Udoy Kumari Ghatwalin v. Hari Ram Shaha* (3), *Salamat Hossein v. Luckhi Ram* (4), *Abdul Lateef v. Doutre* (5) referred to.

It was further contended that it cannot be laid down as an inflexible rule of law that under no circumstances is a right to receive maintenance assignable, that even assuming that the maintenance allowance was inalienable before the decree, there cannot be any doubt that the right acquired by the decree is assignable, that even if the claim upon which the decree was based be an unassignable chose in action, the decree confers a right which is definite and assignable.

*Babu Baranashibasi Mukerji*, for the respondent, contended that a right to receive future maintenance was not assignable and a decree to enforce such a claim stood on no better footing: *Syud Tuffuzzool Hossein v. Rughoonath Pershad* (6), *Monessur Doss v. Beer Protap Sahee* (7), *Sher Singh v. Sri Ram* (8), *Tadman v. D'Epineuil* (9). Though

(1) (1901) I. L. R. 28 Calc. 621. (5) 1889) I. L. R. 12 Mad. 250.

(2) (1899) I. L. R. 27 Calc. 38. (6) (1871) 14 Moo. I. A. 40.

(3) (1901) I. L. R. 28 Calc. 483. (7) (1871) 15 W. R. 188.

(4) (1884) I. L. R. 10 Calc. 521. (8) (1908) I. L. R. 30 All. 246.

(9) (1882) 20 Ch. D. 758.

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the decision was reversed in *Tailby v. Official Receiver* (1), the opinion as to the principle in point was unaffected.

It was further contended that the decree being of an indefinite character was inalienable, that as an assignment of a decree, obtained on a cause of action personal to the plaintiff, ought not to be allowed on the grounds of public policy, that the decree-holder's interest being contingent upon the duration of a person's life should not be allowed to be transferred because to allow such assignments would be to encourage speculative transfers.

*Cur. adv. vult.*

MOOKERJEE AND CARNDUFF JJ. The substantial question of law, which calls for decision in this appeal, relates to the right of an assignee of a decree for maintenance to execute it against the judgment-debtor in the same manner as the original decree-holder. The circumstances under which the present dispute has arisen between the parties, have not formed the subject of controversy before us. On the 18th April, 1900, one Banu Bibi commenced an action for partition of moveable and immoveable properties jointly owned and possessed by her along with her co-sharer. On the 18th April, 1901, a decree was made by consent, the effect of which was that the plaintiff relinquished her claim to the properties in suit, and the defendant undertook to pay her Rs. 5 per month for her maintenance during her lifetime; they also undertook to continue the maintenance to the sons and daughters born of her womb; and the sum payable was made a charge upon certain specified properties. The decree provided lastly that if the money was not paid for two consecutive months, the arrears would carry interest at 6 per cent. per annum from the date of default till that of realisation. On the 25th August, 1905, Banu Bibi assigned all her rights under this decree in favour of Asad Ali and Maharaj Mandal, who are now the appellants before this

Court. On 12th December, 1905, the assignees applied to be substituted on the record and asked for leave to execute the decree. This application was refused by the Subordinate Judge on the ground that no interest had passed under the deed of assignment, as a right to future maintenance was not assignable under the law. The assignees then appealed to this Court. The order of the Subordinate Judge was reversed by Sir Francis Maclean C.J. and Coxe J on the ground that the assignment undoubtedly operated to transfer title at least in respect of the arrears which had accrued due up to the date of the assignment, and consequently it could not be affirmed that the assignees were not entitled to be substituted as such on the record and to execute the decree. The learned Judges expressly left undecided the question, whether by virtue of the assignment, the assignees would be entitled to recover sums which had accrued due after the assignment in their favour had been made. The result was that on the 3rd June, 1908, the assignees again applied for substitution of their names and for leave to execute the decree. The Subordinate Judge held that the assignment was operative in respect of the sums which had accrued due on the 25th August, 1905, but that, in so far as the assignment was intended to transfer to the assignees the right of the original decree-holder to realise arrears of maintenance as they fell due from time to time, it was inoperative in law. It may be stated here that the assignor, upon whom notice had been served and who was a party to the proceedings, did not take any exception to the execution of the decree by the assignees in respect of the arrears subsequent to the date of assignment; the objection was taken by the judgment-debtor alone and was allowed to prevail. The assignees have now appealed to this Court, and on their behalf it has been contended that the assignment was valid and operative and effectively transferred to them all the rights of the decree-holder, inclusive of the right to realise from the judgment-debtors by execution the amount of monthly allowance as it fell due. In

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support of this proposition reference has been made to the cases of *Harris v. Brown* (1), *Haridas Acharjia v. Baroda Kissore Acharjia* (2), *Udoy Kumari Ghatwalin v. Hari Ram Shaha* (3), *Salamat Hossein v. Luckhi Ram* (4), and *Abdul Lateef v. Doutre* (5). This position has been contested on behalf of the judgment-debtor's defendants, and it has been argued on their behalf that a right to future maintenance is not assignable and that a decree obtained for the enforcement of a claim to future maintenance, stands in this respect on the same footing. In support of this proposition, reference has been made to the cases of *Syud Tuffuzzool Hossein v. Raghoo Nath Pershad* (6), *Monessur Doss v. Beer Protap Sahee* (7), *Sher Singh v. Sri Ram* (8). Reference has also been made to the observations in *Tadman v. D'Epineuil* (9), that a charge cannot be validly created so as to be operative an undefined property not belonging to the mortgagor at the date of the execution of the deed, and it has been suggested that this dictum is not affected by the reversal of the decision itself in *Tailby v. Official Receiver* (10). After careful consideration of the arguments addressed to us on both sides, we are of opinion, that the view taken by the Court below is erroneous and cannot be supported.

It may be conceded that there is authority for the proposition that, if a person is entitled to a monthly maintenance allowance under a deed, the allowance can be attached by an execution creditor only after it has become due; in other words, that it cannot be attached prospectively before it has become due: *Kasheeshuree Debia v. Greesh Chunder Lahoree* (11) and *Haridas Acharjia v. Baroda Kissore Acharjia* (2). These decisions are based on the principle that arrears of maintenance may be attached, but not the right to future maintenance, be-

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| (1) (1901) I. L. R. 28 Calc. 621. | (6) (1871) 14 Moo. I. A. 40.     |
| (2) (1899) I. L. R. 27 Calc. 38.  | (7) (1871) 15 W. R. 188.         |
| (3) (1901) I. L. R. 28 Calc. 483. | (8) (1908) I. L. R. 30 All. 246. |
| (4) (1884) I. L. R. 10 Calc. 521. | (9) (1882) 20 Ch. D. 758.        |
| (5) (1889) I. L. R. 12 Mad. 250.  | (10) (1888) 13 A. C. 523.        |
| (11) (1866) 6 W. R. Mis. 64.      |                                  |

cause such right is not assignable. It cannot, however, be affirmed as an inflexible rule that a right to receive maintenance is under no circumstances assignable, and in the case of *Harris v. Brown* (1), the Judicial Committee upheld a sale by a widow, though not a Hindu widow, of her monthly allowance. Cases are also to be found in the books where maintenance grants have by custom acquired the incident of alienability: *Rameswar Singh v. Jibender Singh* (2), *Ram Chundra Marwari v. Mudeshwar Singh* (3), *Durga Dut Singh v. Rameshwar Singh* (4). The case of *Vaidya Nath Sastrial v. Eggia Venkatarama Dikshitar* (5) also shows that a hereditary grant of allowance out of specified lands is not a right to future maintenance which is inalienable by its nature, and as such, exempt from attachment. There are, moreover, cases in which it has been held that an annuity, the payment of which is a charge upon an estate, is property which is alienable and can be attached: *Enaet Hossein v. Nujeeboonissa Begum* (6), *Mahatab Chand Bahadur v. Sreemuttee Dhuncoomaree Bibee* (7), *Maniswar Das v. Baboo Bir Pertab Sahu* (8) and *Harshanker Prosad Singh v. Baijnath Das* (9). We are not prepared, therefore, to lay it down, as an inflexible rule of law, that a maintenance grant is under no circumstances alienable. It is not necessary for us, however, to consider in the present case the precise nature of the right of the assignor to receive a maintenance allowance or an annuity from her co-sharers, in whose favour she relinquished her interest in the joint property, because even if we assume that such right was inalienable, there can be no question that the right given to her by the decree is alienable. It is well settled that in reference to the assignability of a judgment, the cause of action on which it is found is not generally material, and it has been repeatedly affirmed that a judgment recovered for a tort, is assignable to the same extent as one based on a contract. To

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(1) (1901) I. L. R. 28 Calc. 621.

(2) (1905) I. L. R. 32 Calc. 683.

(3) (1906) 10 C. W. N. 978.

(4) (1909) I. L. R. 36 Calc. 943;

L. R. 36 I. A. 176.

(5) (1907) I. L. R. 30 Mad. 279.

(6) (1869) 11 W. R. 138.

(7) (1872) 17 W. R. 254.

(8) (1871) 6 B. L. R. 646

(9) (1901) I. L. R. 23 All. 164.



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take an illustration, in the case of *Palmer v. Cohen* (1), it was ruled that an executor could enter up judgment after verdict in an action of tort, and the same view was adopted in *Kramer v. Waymark* (2). It may be observed, however, with reference to this particular point, that there has been some divergence of judicial opinion, and it has sometimes been maintained that the character of a chose in action is not changed by a verdict, so that in an action in tort, though a verdict has been returned in favour of plaintiff, his cause of action remains unassignable, and an attempted assignment thereof made prior to the rendition of the judgment, is void, and neither transfers the cause of action nor the judgment when subsequently entered thereon. On this principle, it has been ruled that, if the plaintiff in an action for malicious prosecution after obtaining a verdict in his favour, but before the entry of the judgment thereon, assigns the verdict and the cause of action, such assignment is a nullity; consequently the judgment when entered will not belong to the assignee, because if the cause of action was not assignable, its transfer *pendente lite* could not effect an assignment of the judgment subsequently recovered thereon: *Ex-parte Charles* (3), *Buss v. Gilbert* (4), *Scott v. Ambrose* (5), *Walker v. Barnes* (6) and *Gamble v. Central Railway Co.* (7). Whatever difference of opinion there may however be upon the question of the assignment of an inalienable chose in action *pendente lite* before the judgment is perfected, there is no difference of judicial opinion that when the claim has been merged in an actual judgment, the right under the judgment is assignable and the nature of the chose in action is immaterial, [*Comegys v. Vasse* (8) where Mr. Justice Story pointed out that while mere personal rights which die with the party and do not survive to his personal

(1) (1831) 2. B. & A. D. 966.

(2) (1866) L. R. I. Exch. 241;  
 4 H. C. 427.

(3) (1811) 14 East 197.

(4) (1813) 2 M. & S. 70;  
 14 R. R. 591.

(5) (1814) 3 M. & S. 326;

15 R. R. 504.

(6) (1814) 5 Taunt 778;

15 R. R. 655.

(7) (1888) 80 Georgia 595;

12 Am. St. Rep. 276.

(8) (1828) 1 Peter 193.



representative, are incapable of assignment, vested rights, *ad rem* and *in re*, possibilities coupled with an interest and claims growing out of and adhering to property may pass by assignment]: see also the notes to *Dugas v. Mathews* (1), where illustrations are given of valid assignments of judgments when the original cause of action was inalienable. Similarly in *Charles v. Hoskins* (2), Baldwin J. observed that when a judgment is entered, the cause of action is merged therein, and loses most of its pre-existing characteristics, so that, even if the cause of action was not assignable, the judgment is assignable and may be enforced by the assignee in his own name. [Freeman on Judgments, Vol. II, section 425 and Black on Judgments, Vol. II, section 924, where reference is made to *Moore v. Howell* (3) and *Stewart Lee* (4). In this latter case the judgment which was held assignable had been recovered in a breach of promise suit]. We refer to these English and American decisions, not as authorities in any way binding upon this Court, but merely because they embody principles based not upon any technical rules peculiar to those systems, but upon grounds consistent with the rules of equity, justice and good conscience. It is conceded that there is no statutory provision in this country which is directly applicable to this matter. Section 6 of the Transfer of Property Act and section 266 of the Civil Procedure Code of 1882 obviously do not conclude the matter. On the other hand, section 232 of the Code of 1882 or Order 21, Rule 16, of the Code of 1908 does not specifically lay down any restriction upon the assignment of a decree. It may, indeed, be added that while under the old Code, the Court had a discretion whether it would allow execution to proceed at the instance of the assignee, under the new Code, his right of execution does not depend upon the discretion of the Court. It has been argued, however, by the learned Vakil for the judgment-debtor that an assignment of a decree, where the original cause

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(1) (1851) 9 Georgia 510;

54 Am. Dec. 361.

(2) (1869) Iowa 329;

77 Am. Dec. 148.

(3) (1886) 94 N. C. 265.

(4) 1900) 70 N. H. 181;

46 At. 31.

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of action was personal to the plaintiff and not assignable, ought not to be allowed on grounds of public policy. We are unable to accept this contention as well founded. When the cause of action is merged in the decree, there has been an adjudication by a competent Court upon the rights of the parties and the liability of the defendant has been completely defined. It is immaterial to the defendant whether he satisfies the judgment for the benefit of the plaintiff or for that of his representative by assignment. In the case before us, for instance, it ought to be of no consequence to the defendants whether they pay the money into the hands of the original plaintiff or into those of the persons in whose favour she has transferred all her rights under that decree. Under that decree, a certain sum is periodically payable by them, and it is difficult to appreciate on what grounds the defendants can avoid payment to the appellants who acquired the rights of the original decree-holder for valuable consideration. It has been faintly suggested that the value of the interest of the decree-holder is uncertain, contingent upon the length of her life, and consequently a sale thereof is likely to be of a speculative character, and should on this ground be discouraged as contrary to public policy. This contention is obviously unsound, because if this view were maintained, we must hold that no valid transfer could be effected of any life-interest in property or of the interest of a Hindoo female, such as a widow, a daughter or a mother in possession of the estate of the last male owner. It has also been suggested that the conveyance in this case did not effect a transfer of all the rights of the original decree-holder, inclusive of her right to realise by execution the successive instalments of the annuity as they fall due. There is, in our opinion, no force in this contention. The decree in this case is in the form recognised in the Full Bench decision of *Ashutosh Bannerjee v. Lukhimoní Debya* (1), and the decree-holder was entitled to recover in execution, without further suit, the allowance as it accrued due. When the transfer was effected, the allowance for four years was in

(1) (1891) I. L. R. 19 Calc. 139.

arrears. It is inconceivable that a specific sum like this 1910 could have been alienated for a much larger sum; when ASAD ALI the value of the interest was fixed at lrs. 785, there can be MOLLAH no doubt that the interest sought to be transferred, was the v. HAIDAR ALI. entire interest of the original plaintiff in the decree obtained by her. We must consequently hold that the plaintiff intended to transfer the aggregate of her rights under the decree, that such transfer was validly effected, and that the effect thereof is to entitle the assignees to execute the decree from time to time precisely in the same manner as the original decree-holder might have done. The objection taken by the judgment-debtors to the execution of the decree is of an unsubstantial character, and cannot be sustained. We may add that, in our opinion, there would have been a failure of justice, if we had been constrained by any inflexible rule of law to hold that the rights of the decree-holder in the case before us were not assignable in their entirety. There is no room for controversy that the defendants have strenuously endeavoured to avoid payment of the decretal sum, and the original decree-holder, a *pardanashin* lady, has consequently been obliged to part with all her interest in the decree in favour of the present appellants.

The result, therefore, is that this appeal must be allowed and the order of the Court below discharged. The appellants will be entitled to realise by execution whatever sum is leviable under the decree. The appellants are entitled to their costs both here and in the Court below.

S. A. A. A.

*Appeal allowed.*

## CRIMINAL REVISION.

*Before Mr. Justice Harington and Mr. Justice Teunon*

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July 8.

HARENDRA KUMAR BOSE

*v.*

GIRISH CHANDRA MITRA.\*

*Dispute relating to land—Witnesses—Failure of witnesses summoned to attend—Duty of Magistrate to summon or compel the attendance of witnesses at the instance of the parties—Denial of justice—Interference by High Court—Criminal Procedure Code (Act V of 1898) s 145 (4)*

Section 145 of the Criminal Procedure Code does not render it obligatory on the Magistrate to summon witnesses at the instance of the parties, or to compel their attendance after they have been summoned but failed to appear.

*Tarapada Biswas v. Nurul Huq* (1) followed.

Where a Magistrate has acted in accordance with law, it would be necessary to show the High Court very clearly, in order to warrant its interference, that the procedure adopted, though right in law, has in fact amounted to an absolute denial of justice.

Where it did not appear what evidence the absent witnesses would be able to give regarding the question of actual possession, and there was nothing to show what efforts the party had made to procure their attendance, the High Court refused to interfere.

UPON the receipt of a report of the Police Sub-Inspector of Keranigunge thana, dated the 1st November 1909, and a sequent report, the Additional District Magistrate of Dacca drew up a proceeding under s. 145 of the Criminal Procedure Code between Harendra Kumar Bose and others, the petitioners, and Girish Chunder Mitter and others, the opposite party. During the hearing of the case before Babu B. K. Ganguli, Deputy Magistrate of Dacca, the petitioners obtained summonses for the attendance of, amongst others, four witnesses, who, however, failed to appear. The Magistrate refused to compel their attendance, and by his order, dated the 4th February, 1910, declared the opposite party to be in possession. The petitioners thereupon moved the High Court and obtained the present Rule.

\* Criminal Revision No. 480 of 1910, against the order of B. K. Ganguli, Deputy Magistrate of Dacca, dated Feb. 4, 1910.

(1) (1905) I. L. R. 32. Calc. 1093.

*Babu Harendra Narain Mitter*, for the petitioners.

*Babu Atulya Charan Bose* (with him *Babu Akhil Bandhu Guha*), for the opposite party.

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HARINGTON AND TEUNON JJ. This is a Rule calling on the District Magistrate and on the opposite party to show cause why the order complained of in this petition should not be set aside on the ground that the Magistrate neglected to enforce the summons issued to compel attendance of the applicants' witnesses.

The order which is complained of is one under section 145 of the Code of Criminal Procedure, and the question which we have to decide is, *first*, whether in a proceeding under this section it is obligatory on the Magistrate to enforce the attendance of any witness at the instance of the parties; and *secondly*, if it is not so obligatory, whether his action in this particular case has resulted in such a denial of justice to the parties bound by the order as to make it incumbent on us to interfere under the special powers placed in our hands by the Charter.

On the first point, the observation which we have to make is that, under the law, the Magistrate is the sole judge as to whether proceedings under section 145 of the Criminal Procedure Code should or should not be set on foot. The section enables him, in his sole and absolute discretion, to take proceedings under it when he thinks that such proceedings are necessary to enable him to discharge the duty which the law places on his shoulders of preserving the peace in the district under his care. No private person has any right whatever to cause proceedings under that section to be taken. The Magistrate can act on his own motion, and no steps which are taken by a private party can render it incumbent on the Magistrate to act if, in the Magistrate's discretion, he thinks that the proceedings are not necessary. That being so, it is necessary to look to the section to see what it directs the Magistrate to do when he exercises these particular powers. It provides that he shall, without

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reference to the merits of the claims of any of such parties to a right to possess the property which is the subject of dispute, peruse the statements put in, hear the parties, receive the evidence produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order in possession of the land which is the subject matter in dispute. Reading that section we should have been prepared to hold that the section neither contemplated the summoning of witnesses at the instance of the parties nor rendered it obligatory on the Magistrate to compel the attendance of any witnesses unless he, in his discretion, thought it necessary to take the evidence of those witnesses. It is unnecessary for us to discuss this point because the whole matter has been dealt with in the case of *Tarapada Biswas v. Nurul Huq* (1) where this very question was considered with great minuteness and great care, and the conclusion come to was that in proceedings under section 145 of the Criminal Procedure Code, the Magistrate was not under any obligation to compel witnesses to attend at the instance of the parties. The law and the authorities having been very elaborately discussed in that judgment and that judgment being one with which on this point we are in entire agreement, it is quite unnecessary for us to go through the cases which have been there discussed with great care and elaboration. All we can say is that we agree with the conclusion come to by the learned judges who decided that case, and we think that the law does not impose on the Magistrate a duty at the instance of a party to compel the attendance of witnesses at the hearing.

The learned vakil who has appeared in support of the Rule has conceded very frankly that he cannot point to any section of the Code requiring a Magistrate to compel the attendance of witnesses in cases under section 145 of the Criminal Procedure Code, but he says that the refusal of the

(1) (1905) I. L. R. 32 Calc. 1093.



Magistrate to do so amounts to a denial of justice to the parties, and that on this ground we ought to interfere; and this brings us to the second point which has been argued before us. We have perused the affidavit before us which states that four material witnesses did not appear and complains that the Magistrate did not enforce their attendance. But in a case where the Magistrate has acted in accordance with law, it would require very strong circumstances to justify our interference, and it would be necessary to show us quite clearly that the procedure, though right in law, has in fact amounted to an absolute denial of justice. Looking at the facts disclosed and the materials before us, it is quite impossible for us to say the petitioners have made out anything like a case of denial of justice. It does not appear what evidence these witnesses were going to give. There is nothing to show what efforts the petitioners have made to procure their attendance. In so far as the materials before us go, these witnesses may be unable to speak to any fact relevant to the issue as to who was in possession of the land in question and their absence may be due to the neglect of the petitioners to ask them to appear. We are entirely in the dark on the evidence and on the materials before us as to whether the petitioners have made any serious efforts to produce the witnesses before the Magistrate. This concludes the two points which have been argued before us.

Then it is said that the matter ought to be referred to a Full Bench. We do not think it necessary to take that step in this case. It is conceded that there is no particular section which gives the petitioners the right they allege that they ought to have, and the question whether, on the facts of this particular case, there has been a denial of justice rendering it incumbent upon us to interfere under the Charter, is a question which of course could not be referred.

For these reasons we discharge the Rule, and we think it unnecessary to make the reference asked by the learned vakil for the petitioners.

E. H. M.

*Rule discharged.*

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# APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,  
and Mr. Justice Woodroffe.*

1910  
July 12.

BRITISH AND FOREIGN MARINE INSURANCE  
CO., LD.

v.

INDIA GENERAL NAVIGATION AND RAILWAY  
CO., LD.\*

*Common Carrier, liabilities of—Contract of carriage—Excepted risks—Construction—Negligence, indemnity against—Carriers Act (III of 1865) ss. 6, 8, 9—Insurance policy “warranted no recourse against carriers”—Subrogation—Right to recover—Misjoinder—Damages.*

Goods were shipped on a flat belonging to the carriers under a bill of lading endorsed to the Manufacturing Company, by clause 5 whereof “the carriers were exempt from loss of the goods unless such loss should have arisen from the negligence or criminal acts of their servants or agents.” There was an existing agreement between the Manufacturing Company and the carriers, by clause 10 whereof “the Manufacturing Company undertook and agreed to hold the carriers harmless and indemnified from and against all claims which could be insured against or covered by an ordinary F. P. A. policy.” An ordinary F. P. A. policy was issued by the Insurance Company in favour of the Manufacturing Company in respect of the goods, having the clause “warranted no recourse against carriers.”

The goods were lost by the negligence of the carriers, and the Insurance Company paid the Manufacturing Company the amount of the policy. In an action for the loss of the goods, brought by the Insurance Company and the Manufacturing Company against the carrying company, as common carriers:—

*Held*, that the action lay.

The rights and liabilities of the common carrier in India are outside the Indian Contract Act and are governed by the principles of the English Common Law as modified by the Carriers Act. A common carrier is subjected to two distinct classes of liability (i) insurable risks from which the element of default is absent and (ii) carrying risks, in which that element is present. English Courts in dealing with exemption clauses recognise this distinction and construe them as not extending to carrying risks in the absence of clear words to that effect.

\* Appeal from Original Civil, No. 48 of 1909.

*Price & Co. v. Union Lighterage Company* (1), *James Nelson & Sons, Limited, v. Nelson Line (Liverpool), Limited* (No. 2) (2), *Wylde v. Pickford* (3), *D'Arc v. London and North-Western Railway Company* (4), *Martin v. The Great Indian Peninsular Railway Company* (5), *Czech v. General Steam Navigation Company* (6), and *Crouch v. The London and North-Western Railway Company* (7) referred to.

*Baxter's Leather Company v. Royal Mail Steam Packet Company* (8) distinguished.

*A fortiori*, in India where there is statutory prohibition against exempting a carrier from loss arising from negligence and criminal acts, this canon of construction should be adopted, at any rate within the limits implied in the prohibition.

Clause 10 of the agreement must be construed as an integral part of the contract of carriage: it did not extend to loss arising from negligence or criminal acts.

The stipulation in the policy "warranted no recourse against carriers" did not amount to a relinquishment by the Insurance Company in respect of risks not exempted, *i.e.*, where the loss had arisen from the negligence of the carriers.

*Thomas & Co. v. Brown* (9) distinguished.

Inasmuch as the Insurance Company claimed by way of subrogation and not assignment; the suit should have been brought only in the name of the Manufacturing Company.

*Burnand v. Rodocanachi* (10), and *Simpson v. Thomson* (11) referred to.

APPEAL by the plaintiff Companies from the judgment of Harington J.

This action was instituted by the British and Foreign Marine Insurance Co., Ltd., and the Ganges Manufacturing Co., Ltd., against the India General Navigation and Railway Co., Ltd., as common carriers to recover the sum of Rs. 27,915 in respect of 1,000 bales of jute lost on the carriers' flat on the ground that the loss was caused by or arose from the negligence or criminal acts of the carriers or their servants or agents. The Ganges Manufacturing Co. were the owners of the jute and had received from the Insurance Company under a policy the amount claimed in the suit.

(1) [1904] 1 K. B. 412.

(2) [1907] 1 K. B. 769

(3) (1841) 8 M. & W. 443.

(4) (1874) L. R. 9 C. P. 325.

(5) (1867) L. R. 3 Ex. 9.

(6) (1867) L. R. 3 C. P. 14.

(7) (1854) 23 L. J. C. P. 73, 82.

(8) [1908] 2 K. B. 626.

(9) (1899) 4 Com. Cas. 186.

(10) (1882) L. R. 7 A. C. 333, 339.

(11) (1877) L. R. 3 A. C. 279.

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It appears that on the 23rd May, 1906, the Ganges Manufacturing Co. had entered into an agreement with the India General Navigation and Railway Co. and certain other steamer companies which contained, *inter aliâ*, the following clauses:—

“1. The Jute Company hereby agrees and undertakes to contract with the steamer companies for the conveyance of jute from Naraingunge, Serajgunge, Juggernathgunge and-or Sarisabari when water permits, Berah, Dacca, Panibari and Chandpur for the term of five years computed from the 1st July, 1906.

“2. That during the said term the Jute Company shall not send or transmit any jute from any of the said ports save by the steamers, flats or other vessels of the steamer companies or by such means of conveyance as may be provided by the Eastern Bengal State Railway in conjunction with steamer companies. The Jute Company binds itself to forward all unshipped jute bought by them by steamers, flats or vessels belonging to the steamer companies; or by steamer or flats run on the combined services in conjunction with the Eastern Bengal State Railway—provided always that the said steamer companies can supply the necessary space.

“10. The Jute Company undertakes and agrees to hold the steamer companies harmless and indemnified from and against all claims which can be insured against or covered by an ordinary F. P. A. policy, that is to say against claims for actual or constructive total loss only of the goods insured and not against claims for partial loss or damage unless the vessel be stranded, sunk or burnt, and the steamer companies agree that they shall have no right to claim on the cargo for general average.

On the 25th February, 1908, the India General Navigation and Railway Co. issued a bill of lading in respect of 1,000 bales of jute on their flat “Ternro” then at Madari-pore and bound for Calcutta. The jute was shipped by G. R. Chakravarti & Co. for delivery to Landale and Morgan

or the carriers' Calcutta agent at the mill of the Ganges Manufacturing Co. The bill of lading, which was subsequently endorsed by Landale and Morgan to the order of the agent—Ganges Mill, was issued subject to *inter alia* the following conditions endorsed thereon:—

“5. The Company will not be liable for the loss of damage to, any property delivered to them to be carried, unless such loss or damage shall have arisen from the negligence or criminal act of their servants or agents.

“17. In the event of any of these conditions conflicting or appearing in conflict with the terms of any other agreement between the shippers and Company these conditions or the terms of agreement shall prevail at the option of the Company.”

On the 26th February, 1908, Landale and Morgan sent a letter to the agents of the Insurance Company advising them of the shipment of the cargo in question and asking that a policy may be issued in the name of the agents of the mill. On receipt of this letter a covering slip was issued by the Insurance Company.

On the 27th February, 1908, a letter was despatched from Barisal by the agents of the Rivers Steam Navigation Company to the managing agents of the defendant Company confirming a telegram of that date reporting that the flat “Lemro” was on fire at Madaripur and was sinking, and on the 29th February and the 2nd March the Insurance Company received notices of the loss from Landale and Morgan and the Ganges Company respectively.

On 3rd March, the agents of the defendant Company wrote to Landale and Morgan announcing the loss of the consignment of jute in question, and stating that it had been found necessary to scuttle the vessel and it was expected that little of the jute would be saved.

On the 5th March, 1908, the Insurance Company issued to the Ganges Manufacturing Company a policy in their ordinary form (F. P. A.) on the 1,000 bales of jute valued at Rs. 27,915 covered by the slip of 26th February, shipped on

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the "Lemro," lost or not lost, the risk to commence from the time when the goods should be loaded. The policy was "warranted free from particular average unless the vessel or craft be stranded, sunk or burnt," and there were stamped on the face of the policy the words "warranted no recourse against carriers."

On the 1st April, 1908, the Ganges Company claimed from the Insurance Company the sum of Rs. 27,915 in respect of the loss of the goods covered by the policy, and on the 23rd May, 1908, the Insurance Company paid the Ganges Manufacturing Company the amount of the policy. Notice of the loss was given to the defendant company by a letter of 19th May, addressed and delivered to the managing agents. The Insurance Company now demanded the amount paid by them under the policy from the defendant company. The latter refused to entertain the claim on the ground that the goods had been received on the clear understanding that the consignees would arrange that any Insurance Company with whom they insured would adopt no recourse against the Carrying Company in the event of loss from any cause. On the 20th February, 1909, a cheque was tendered to the Insurance Company for their share in the proceeds of the salvage. This was refused and on the 26th February, 1909, this action was instituted by the Insurance Company, who claimed by subrogation to be entitled to recover from the defendant Company the amount of the loss. For greater safety, the Manufacturing Company were joined as co-plaintiffs. It was not seriously disputed by the defendant carrying company that the loss was due to the negligence of their servants. The main pleas taken in defence were:—(i) that by clause 10 of the agreement of the 23rd May, 1906, the Manufacturing Company had agreed to indemnify the defendant company against all claims which could be insured against under an ordinary F. P. A. policy and so could not recover and that the Insurance Company stood in no better position and (ii) that the Insurance Company had expressly relinquished their rights by issuing a

policy "warranted no recourse against carriers." It was further submitted in paragraph 12 of the written statement that the plaintiff Manufacturing Company were wrongly joined as plaintiffs in the suit.

In the Court of first instance Harington J. found that the steamer company were accustomed to issue two different species of bills of lading, one known as the ordinary uncoloured bill of lading which is the bill of lading under which the jute in question was carried, the other a blue or red bill of lading under which the Company in consideration of receiving a higher freight undertook the liabilities of an insurer under an F. P. A. policy in respect of the goods they carried, and that it was the practice of the Insurance Company to charge a higher premium on policies warranted without recourse against carriers than on policies, which did not purport to relinquish the right of recourse against carriers.

The suit was dismissed with costs. After dealing with the facts his Lordship continued:—

"Now apart any special contracts the carrier would at Common Law be liable to the Ganges Manufacturing Company for all losses other than those arising from the act of God or the King's enemies. But the carriers are entitled under the law to limit in their contract of carriage the liabilities which the Common Law imposes on them and they have so limited them, with the result that it is agreed between the carriers and the owners of the jute that if the loss is due to causes out of which they cannot, or do not purport to contract themselves then the loss falls on the carriers. If, on the other hand, the loss is one for which they are not liable at Common Law or which they have contracted themselves out of, then the loss falls on the owners of the goods.

But I have no doubt that neither party supposed that the owners of the goods intended to take on their shoulders the risks which, but for the terms of the contract of carriage, the carriers would have to bear. I have no doubt it was contemplated that the owners would insure themselves against loss by such risks. If the owners of the goods insured without informing the insurers that they had by a special arrangement surrendered the rights which the Common Law gave them against the carriers, they would run the risk that the insurers would refuse to pay on the policy on the ground that the assured had concealed from them a fact materially affecting the risk to be undertaken. The assured therefore obtain from the insurers a policy "warranted without recourse against carriers" and the insurers on receiving a higher premium in consideration of this agreement not to have recourse against the carriers, issue such a policy.

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Now in this case the Ganges Manufacturing Company and the carriers have entered into two contracts, one the contract of carriage to be found in the bill of lading under which this particular lot of jute was carried. The other is the agreement by which the Ganges Manufacturing Company agree that for a period of five years they will send all their jute by the vessels belonging to the companies (amongst other the defendants) which are parties to the agreement. And this agreement contains *inter alia* a term under which the Ganges Manufacturing Company undertakes to indemnify the carriers against any claims which are covered by an ordinary F. P. A. policy.

It is argued that this agreement is void as it purports to relieve the carriers of a liability from which under the Carriers' Act they can not set themselves free.

The carrier desires to limit his liability as far as he can; the owner of the goods is willing to look to an Insurance Company to protect him against such losses as are covered by an ordinary F. P. A. policy instead of to the carriers and looks to the carrier to make good any losses which would under the law fall on the carrier if they are not covered by the policy. That there should be no dispute as to what the carrier will have to bear the indemnity clause is introduced. It is in effect this—the owner of the goods says:—"If I am paid my loss under any ordinary F. P. A. policy, I will indemnify you, the carriers, against claims by those who have paid me," and in order to protect himself against being called on pay under his agreement with the carriers he stipulates that those who issue the policy shall not make claims against the carriers for losses covered by that policy.

Is there anything illegal in such a contract?

I do not think so. No doubt under section 8 of the Carriers' Act no contract under which the carrier purported to relieve himself of liability for the negligence or fraud of his servants would operate to relieve him of that liability, but I see no reason why having that liability he should not enter into a contract with some other person to indemnify him against loss in respect of that liability.

Had the contract or indemnity been with an Insurance Company direct no sort of objection could have been raised. I do not see on what ground a contract lawful with an Insurance Company becomes unlawful when made with a Jute Company.

Had the contract of indemnity been included in the clauses printed on the back of the bill of lading as one of the terms on which the Carrying Company did its business with the ordinary public, had it purported to bind any person who might be the holder of the bill of lading then it might with some reason be contended that in so far as the indemnity clause made every holder of the bill of lading bound to indemnify the carrier it could not be enforced as being in effect nullified by section 8 of the Carriers' Act.

But clause 10 of the agreement of May 23rd, is not a contract by the owner of the goods as such to indemnify the carrier, it is a contract by the Jute Company and there is nothing in it to limit their liability to indemnify the carrier against their own claims only. Sup-



pose after shipping under the agreement they endorsed the bill of lading to a third party and the goods were subsequently lost by a peril which could be covered by an ordinary F.P.A. policy they would have no answer to a claim by the carrier to be indemnified against claims made by that third party.

The Jute Company agrees to look to the Insurance Company instead of to the carrier to indemnify it against such losses as the Insurance Company will cover by an ordinary F. P. A. policy—and it undertakes to indemnify the carrier against any claim made in respect of such losses by the Insurance Company.

If it undertakes to indemnify the carriers then it cannot recover against them in respect of a claim against which it has undertaken to indemnify them, and the Insurance Company equally cannot recover on a claim on which the assured cannot recover: *Simpson v. Thomson* (1).

To protect itself from being called on to indemnify the carriers against such claims it pays a higher premium to the Insurance Company in consideration of the Insurance Company surrendering the claims it may have against the carriers. But it is contended on the authority of *Tate v. Hyslop* (2), that the Insurance Company do not by warranting the policy without recourse against carriers guarantee that they would bring no action against the carriers, that the warrant only means that the Insurance Company will not sue the carriers in respect of any liability out of which the carriers are entitled to contract themselves under the Carriers' Act—i.e. those liabilities from which they contract themselves free under the form of their ordinary bill of lading. But if this were so a warranty without recourse against carriers would be unnecessary as the Insurance Company having paid a loss on goods carried under a bill of lading could acquire as against the carrier no greater rights than the holder of the bill of lading had in respect of the carriage of his goods. One witness has no doubt stated that "without recourse against carrier" means that the Company has notice that the common law liability of the carrier has been limited. This is giving the words a meaning different from their ordinary grammatical meaning, and I should not place that meaning upon them without strong evidence that that was the meaning invariably borne by these words in a Policy of Insurance. In *Tate v. Hyslop* (2), it was stated that the words "no recourse to Lighterman" meant no recourse except for negligence, but no question arose on this point, and the decision did not turn on the meaning to be attached to these words.

It is to be observed that the Company have never raised the contention that the non-disclosure on the contract of the indemnity in clause 10 of the agreement of May 23rd, 1906 was the concealment of a material fact which would absolve them from liability to pay the assured. On the contrary they paid; and must therefore be taken to have admitted that they were under the policy liable to pay. The case of *Price and Co. v. The Union Lighterage Company* (3), is

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relied on by the plaintiffs as showing that where a carrier is exempt from loss or damage to goods which can be covered by insurance he nevertheless remains liable for negligence. The question in that case was whether the particular loss, which was due to negligence was covered by the expression, "loss or damage which could be covered by insurance." It was held that the loss by negligence was not so covered and that a stipulation in the contract of carriage that the carrier would not be liable for losses which could be covered by insurance did not relieve of liability for a loss due to negligence. But here the question whether the loss is one which can be insured against or covered by an ordinary F. P. A. policy cannot arise because the plaintiff Insurance Company having paid and the Ganges Manufacturing Company having accepted payment on the footing that the loss is covered by the policy they issued the plaintiffs cannot now be heard to say that it is not.

The only other case which was cited to illustrate the meaning of the words "without recourse to carriers" is the case of *Thomas v. Brown* (1). That case was in its facts very like the present but for the circumstance that the carrier made no written contract with the owners of the vessel; and there is an express finding that the loss was not due to the negligence of the lighterman. In that case in a considered judgment Mathew J. held that an Insurance Company who had covered goods "without recourse to lighterman" were not entitled to recover on the ground first that the lighterman under the terms of the contract of carriage was not to be liable to pay any losses covered by insurance and secondly, on the ground that the underwriters were not entitled to say that a right which they had relinquished was subrogated to them. The learned Judge while holding that there was no case of negligence against the lighterman expressly said that it was unnecessary to decide that point.

This case is an authority for the proposition that where the underwriters have in their policy expressly agreed with the assured that the assured's rights against the carrier shall not be subrogated to them, they are not entitled to recover. I agree with Mr. Pugh that a plea by the carrier that the insurer had promised the assured not to sue the carrier would be no defence in law to an action by the Insurance Company against the carrier, but in this case the carrier is not compelled to plead or prove a contract made between other parties.

He can call on the plaintiff to prove his case, the plaintiff has to prove the policy and payment to show that he has acquired the rights of the cargo owners. When he produces his policy he proves that it is expressly provided that he shall not acquire the rights of the cargo owners against the carriers.

I think the defendant is entitled to rely on this and to say that on the plaintiff's own case it has been shown that he has relinquished the rights which the law would have ordinarily given him.

A question of jurisdiction was raised and overruled and it is unnecessary to say anything further about it.

The conclusion I have come to is that the Ganges Manufacturing Company are not entitled to recover against the defendants on the contract in the bill of lading because the claim having been paid under an ordinary F. P. A. policy is one against which they have undertaken to indemnify the defendants; the Insurance Company stand in no better position than the Ganges Manufacturing Company, and further the Insurance Company have shown on their own evidence that they relinquished their rights against the defendants.

The result is that the action must be dismissed with costs on Scale No. 2."

From this judgment the plaintiff Companies appealed.

*Mr. S. R. Dass* (with him *Mr. B. L. Mitter*), for the appellant Companies. The contract of 1906 between the Manufacturing Company and the Steamer Company affords no defence to the action. The contract does not cover goods shipped from or lying at *Madaripur*. Again the goods were shipped by *G. R. Chakravarti & Co.* and not by the Manufacturing Company—hence the contract has no application. With reference to clause 10 of the contract, it is submitted:—

First, clause 10 did not purport to cover the negligence or criminal acts of the carrier, but only to indemnify against insurable risks: secondly, if clause 10 did purport to cover the negligence or criminal acts of the carrier, it would be void and inoperative under section 8 of the Carriers Act of 1865. In England, a carrier can by express stipulation contract himself out of liability for negligence, yet even there for want of an express exemption relating to negligence the carrier was held liable for loss caused by negligence: *Price & Co. v. Union Lighterage Company* (1) and on appeal (2). In that case the insurance was to be effected "without recourse to lighterman": it was held, the expression "without recourse" referred to excepted risks and not negligence or criminal acts: see also *Thomas & Co. v. Brown* (3).

*A fortiori*, in this country where the carrier cannot contract himself out of negligence, the expression "no re-

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(3) (1899) 4 Com. Cas. 186.

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course"—the policy was warranted no recourse against Carriers—should be construed to except only insurable risks. See *Tate v. Hyslop* (1) for the origin of the term "no recourse." The "no recourse" clause in the policy was a matter as between the owner and the insurer and not between the carrier and the owner. Clause 10 was directed to explain what was contemplated by an F. P. A. policy.

[JENKINS C.J. The question is how far the rights of subrogation have been modified by a collateral contract between the owner and the Insurance Company: see *Simpson v. Thomson* (2).]

*Simpson v. Thomson* (2) turned on the rights of underwriters by subrogation. The rights of parties according to the doctrine of subrogation are explained in *Castellian v. Preston* (3): see *Storer v. Gordon* (4) and *North British and Mercantile Insurance Company v. London, Liverpool and Globe Insurance Company* (5). A third party cannot take advantage of a contract. The contract of carriage was an open contract governed however by the bill of lading. *Trinder Anderson & Co. v. Thames and Mersey Marine Insurance Company* (6) was also referred to.

[JENKINS C.J. You are suing by right of subrogation. The suit should have been brought only by the owner, who was the original contractor.]

For greater safety both the owner and the insurer were joined as co-plaintiffs.

*Mr. Jackson* (with him *Mr. B. C. Mitter*), for the respondent Company. It is submitted the suit is wrongly framed; it should have been brought by the Insurance Company in the name of the owner. Harington J. found that the agreement of 1906 was subsequently extended to Madaripur: and in the Court of first instance no point was taken as to G. R. Chakravarti & Co. being the shippers. The action could not be maintained by the Insurance Company. The Policy was

(1) (1885) L. R. 15 Q. B. D. 368. (4) (1814) 3 M. & S. 308.

(2) (1877) L. R. 3 A. C. 279.

(5) (1876) L. R. 5 Ch. D. 569.

(3) (1883) L. R. 11 Q. B. D. 380.

(6) [1898] 2 Q. B. 114.

"warranted without recourse against carriers." By this clause the Insurance Company expressly relinquished any rights they might otherwise have had by subrogation: the consideration for this was the higher rate of premium charged. The decision in *Price & Co. v. Union Lighterage Company* (1) turned on the finding that negligence had not been expressly exempted. In the present case negligence was expressly excepted. If all other risks were already excepted under the bill of lading, the words "no recourse" in the policy must be taken to refer to negligence, or they would have no meaning at all.

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Assuming that the Insurance Company were subrogated to the rights of the assured, or that the suit had been brought by the owners, even then no action would lie. In *Barter's Leather Company v. Royal Mail Steam Packet Company* (2), it was held that notwithstanding that the loss was due to the negligence of the carriers, they were only liable to the limited extent provided in the bill of lading. The legal effect of negligence under the Carriers Act is the same as in English Law.

Clause 10 of the agreement and the issue of the uncoloured bill of lading at the lower rate afford a complete defence to the action. There is nothing in law to prevent a carrier from issuing a bill of lading at a special rate on the understanding that he is to be indemnified against all losses. It was laid down as a doctrine of public policy by Jessel, M. R., "that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into fully and voluntarily shall be held sacred and shall be enforced by Courts of justice": *Printing and Numerical Registering Company v. Sampson* (3): see also *Tullis v. Jackson* (4). Clause 10 is not avoided by section 8 of the Carriers Act of 1865. The carriers undoubtedly could have insured against the negligence of their servants. Clause 10 amounts to such an insurance. In view of this indemnity the carriers accepted a lower rate. The owners

(1) [1904] 1 K. B. 412.

(2) [1908] 2 K. B. 626.

(3) (1875) L. R. 19 Eq. 462, 465.

(4) [1892] 3 Ch. 441.

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paid freight on the basis of the carriers taking the lower scale of risk and now claim on the basis of the carriers being liable on the higher scale. The carriers would be entitled to bring a cross-suit under the indemnity clause. The object of the agreement was to avoid a cross-suit and to give an immediate remedy.

*Mr. B. C. Mitter* (following). Clause 10 was a contract of indemnity and must be construed more strictly against the shipper who promised to indemnify and in favour of the carriers, who were to be indemnified: *Hargreave v. Smec* (1). Clause 10 does not infringe the Carriers' Act. "An act evaded is not an act infringed" Craies' Statute Law, 4th edition, p. 76, *Ramsden v. Lupton* (2). Clause 10 does not prevent the carriers' liability from arising: any attempt to do so, would be an infringement of the Act. All that clause 10 purports to do is, to provide for the protection of this liability. The carriers are primarily liable, but are protected by an indemnity.

*Mr. S. R. Das*, in reply. Clause 10 is not part of an independent agreement. It can only be introduced under clause 17 of the bill of lading. The owners cannot barter away the right to sue. *Dufourcet v. Bishop* (3).

JENKINS C.J. This appeal arises out of a suit brought against common carriers to recover Rs. 27,915 in respect of 1,000 bales of jute lost on the carriers' flat on the allegation that the loss or damage to the goods was caused by, or arose from the negligence or criminal acts of the carriers or their servants or agents, the plaintiffs being the owners of the goods and an Insurance Company, who have paid these owners under a policy on the goods the amount now claimed.

The point in contest is whether as the carriers contend they are exempt from liability by the terms of a contract between the owners and the carriers and of the policy under which the goods were insured by the Insurance Company.

(1) (1829) 6 Bing. 244.

(2) (1873) L. R. 9 Q. B. 17.

(3) (1886) L. R. 18 Q. B. D. 373.



On the 25th of February, 1908, the India General Navigation and Railway Co., Ltd., (to whom I will hereafter refer as the Carrying Company) issued a bill of lading in respect of 1,000 bales of jute on their flat "Lemro" then at Madaripur. the jute was shipped by C. R. Chakravarti & Co. for delivery to Landale and Morgan or the carriers' Calcutta agent at the mill of the Ganges Manufacturing Co., Ltd., to whom I will hereafter refer as the Manufacturing Company. On the 5th of March, 1908, the British and Foreign Marine Insurance Co. to whom I will hereafter refer as the Insurance Company in accordance with a previous letter of cover issued a policy of insurance for Rs. 27,915 in respect of the jute in favour of the Manufacturing Company to whom the bill of lading had been endorsed. The flat "Lemro" with the jute on board caught fire and had to be scuttled with the result that the jute was lost. On the 23rd of May, 1908, the Insurance Company paid the Manufacturing Company Rs. 27,915 under the policy, and they claim by right of subrogation to recover this amount from the Carrying Company. It is to enforce their claim that this suit has been brought by the Insurance Company and the Manufacturing Company. Harington J. has held in favour of the carrying Company and dismissed their suit: hence this appeal.

Before attempting to determine the rights of the parties as defined by the special contracts on which reliance is placed, it will be well to see what are the relative rights and liabilities of common carriers and those for whom they carry apart from special contract. These rights and liabilities are outside the Indian Contract Act and are governed by the principles of the English Common Law as modified by the Carriers' Act of 1895. A common carrier, therefore, in India is subject to two distinct classes of liability, the one for loss for which he is liable as an insurer, the other for loss for which he is liable under his obligation to carry safely. Speaking generally the first of these are insurable risks from which the element of default is absent, the second are risks of conveyance in which that element is present. The Car-

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riers' Act of 1865 has in some degree modified this position.

This Act follows the scheme but not the details or the language of the English Carriers Acts, Geo. IV and Will. IV, 68.

The earlier sections limit the liability of carriers in respect of the perishable or valuable goods specified in the schedule to the Act. Section 6, which is applicable in the circumstances of this case, provides that "the liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule to this Act, shall not be deemed to be limited or affected by any public notice." While section 8 provides that "notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried, where such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants." Section 9 is in these terms:—"In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents."

The effect of these sections is that the liability of a common carrier for the loss of goods not being of the description contained in the schedule may be limited by special contract signed by the owner save when such loss shall have arisen from the negligence or a criminal act of the carrier or any of his agents or servants.

This then being the nature of a common carrier's liability, it now becomes necessary to see how far it has been limited by special contract in this case.

The jute, as I have already said, was shipped by G. R. Chakravarti & Co. and on the 25th of February, 1908, a bill of lading was issued in which G. R. Chakravarti & Co. were stated to have shipped the jute in the flat "Lemro" then at Madaripur, and it was further stated that the jute was received subject to the conditions endorsed thereon to be de-

livered for and on account of and at the risk of the shipper to Landale and Morgan or to the Carrying Company's agent at Calcutta, Ganges Manufacturing Company's jute mill or a near thereto as the state of the rivers might permit.

By the 5th condition it is provided that "the Company will not be liable for the loss or damage to any property delivered to them to be carried, unless such loss or damage shall have arisen from the negligence or neglect act of their servants or agents."

This bill of lading was endorsed to the order of the Agents, Ganges Mill, by Landale and Morgan. What the relations were between the shippers and the Manufacturing Company does not appear, nor are the parties before us agreed on the point.

If matters rested there the Carrying Company would manifestably be liable on the terms of the contract as evidenced by the bill of lading for loss that had risen from the negligence of their servants or agents. But there are other documents that have to be considered; first there is a contract of the 23rd of May, 1906, between the Manufacturing Company and certain steamer companies of which the Carrying Company were one, and next there is a policy of insurance issued by the Insurance Company to the Manufacturing Company.

By the contract of the 23rd of May, 1906, the Manufacturing Company agreed in effect to have all their jute from certain named ports conveyed by one or other of the steamer companies for a term of 5 years and during the term not to send any jute from any of those ports save by the steamer, flats or other vessels of the steamer companies. They further bound themselves to forward all unshipped jute bought by them by steamers, flats or vessels belonging to the steamer companies or by the alternative route then indicated. By clause 10 it is provided that "the Jute Company undertakes and agrees to hold the steamer companies harmless and indemnified from and against all claims which can be insured against or covered by an ordinary F. P. A. policy, that is to say, against claims for actual or constructive total loss

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only of the goods insured and not against claims for partial loss or damage unless the vessel be stranded, sunk or burnt and the steamer companies agree that they shall have no right to claim on the cargo for general average."

This clause, the Carrying Company maintain, is one of the matters entitling them to exemption. First then it has to be seen whether it has any application in the circumstances of this case, and then whether on its true construction it has the force for which the Carrying Company contend.

Now it is to be noticed that the agreement of the 23rd of May, 1906, relates to jute sent or transmitted by the Manufacturing Company or unshipped jute bought of them, and clause 10 can only relate to jute falling within that category. But I have already shown that under the bill of lading this jute is expressed to have been shipped by G. R. Chakravarti & Co. and there is nothing to show that the relations between him and the Company were such as to demand the inference that he was acting for the Manufacturing Company or that the jute was bought by that Company unshipped. Moreover this jute was despatched from Madaripur, and not from one of the ports specified in the agreement, and there is not a word on the record of this case to show that this agreement was extended to jute from Madaripur. It is true that the learned Judge says otherwise: but he must have had in mind what was proved in another case. Further than this the jute was shipped at a rate other than that stipulated in this agreement. There is thus an initial difficulty in the way of applying the terms of the agreement to this jute. But I will pass that bye and consider what is the legal effect of these two documents. Clause 5 of the bill of lading contemplates that the Carrying Company shall be liable for loss arising from the negligence or criminal acts of servants or agents: clause 10 of the agreement according to the reading proposed by the Carrying Company is designed to protect them against loss so originating. There is, therefore, here a conflict, but the Carrying Company would compose it by applying the terms of section 17 of the bill of lading. That, however, only ap-

plies when the conditions of the bill of lading conflict with the terms of any other agreement between the shippers and the Carrying Company; it is G. R. Chakravarti & Co., who are the shippers; and the agreement of the 23rd of May, 1906, is not with them. Therefore as it seems to me if matters rested there the bill of lading must prevail. But in the view I take of clause 10 of the agreement there is no conflict.

I have already indicated that the risks of a common carrier are twofold, insurance risks and carrying risks. It has been the policy of the English Courts in dealing with exemption clauses to recognise this distinction and to construe them as not extending to carrying risks in the absence of clear words to that effect. In India, where there is a statutory prohibition against exempting a carrier from loss arising from negligence or criminal acts, there is perhaps an even stronger reason for adopting this canon of construction at any rate within the limits implied by the prohibition. I need not refer to the English cases on this point; they are collected in *Price & Co. v. Union Lighterage Co.* (1) and on appeal (2), and *James Nelson & Sons, Limited v. Nelson Line (Liverpool) Limited* (3). Mr. Mitter sought to escape from this by suggesting that this doctrine was limited to bills of lading, but numerous cases show that this is not so and by way of illustration I may refer to *Wyld v. Pickford* (4), *D'Arc v. London & North Western Railway Co.* (5) and *Martin v. The Great Indian Peninsular Railway Co.* (6). But then he contended that at any rate it could not be applied to clause 10 of this agreement, for this he maintained was an independent contract of indemnity which therefore should be construed strictly against the Manufacturing Company as the insurers. His argument was this "I am not seeking to escape from my liability for negligence under the bill of lading, but merely to protect myself under the indemnity given me by the Manufacturing Company"; and this

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(2) [1904] 1 K. B. 412.

(3) [1907] 1 K. B. 769.

(4) (1841) 8 M. & W. 443.

(5) (1874) L. R. 9 C. P. 325.

(6) (1867) L. R. 3 Ex. 9.

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indemnity, he argued, was absolute and so would operate to protect the Carrying Company, not only against liability to any endorsees of the bill of lading, and this though the liability might arise from a loss occasioned by a criminal act of the Carrying Company, its agents or servants. There is nothing on the record to show that the Manufacturing Company had power to make any such contract, but apart from that I think this contention must fail. It is true that the agreement of the 23rd of May, 1906, is not a bill of lading, but a contract between common carriers and intending shippers, and clause 10 is not an independent contract of indemnity, but an integral part of this contract as to carriage and must be so construed. Indeed, if it were an independent contract in the sense for which Mr. Mitter contends, then this would seem in itself to furnish an answer to the Carrying Company's contention that it is not liable in this suit, but this I need not elaborate. The rule of construction which limits the operation of a clause of exemption is based on no technicality but on sound policy, and as it is pointed out by Willes J. in *Czech v. General Steam Navigation Company* (1) it is consistent with the views of modern jurists and will be found in many of the Maritime Codes of Europe. The decision in *Baister's Leather Co. v. Royal Mail Steam Packet Company* (2) was cited to us as though it modified this view. The Court there held that the exemption in that case extended to losses occasioned by the shipowner's negligence notwithstanding this rule of construction as the words and provisions of the bill of lading left no room for doubt. This case in fact expressly recognises the rule and in no way detracts from its force. Nor does this case help the Carrying Company so far as it may be cited as a guide for the construction of the clause 10. What influenced the Court there was the fact that there were alternative rates and that the shipper did not avail himself of that rate which would impose on the ship owner a larger liability, and the view that the clause in question would have no operation unless it applied to cases of negligence. But

(1) (1867) L. R. 3 C. P. 14.

(2) [1908] 2 K. B. 626.

neither of those factors are present here: a rate was paid which imposed upon the Carrying Company liability for loss arising from negligence or criminal acts (see clause 5 of the bill of lading) and there are several grounds of liability to which clause 10 of the agreement would apply, though the exemption be not extended so as to cover and protect negligence. In my opinion therefore on a true construction of clause 10 of the agreement it does not extend to loss arising from negligence or criminal acts inspite of the wide terms in which it is expressed. The position then would seem to be that described in *Crouch v. The London and North Western Railway Company* (1) where Maule J. said "A common carrier who makes no stipulation is liable as insurer, but a common carrier who by notice limits his liability and says 'I will not contract as an insurer or I will only contract to such and such an extent or to the extent of such a value' still remains in all other respects a common carrier, because although the incident of not being an insurer does not apply to him that is simply because it is not provided for."

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Therefore clause 10 would be no answer to a suit brought by the Manufacturing Co. for a loss arising from the negligence or criminal acts of the Carrying Co., its agents or servants and it is solely with loss so originating that I am concerned. I say that it is with loss so arising that I am concerned as in the absence of evidence to the contrary section 9 of the Carriers' Act of 1865 would apply.

Does it then make any difference that the Insurance Company is the real claimant?

The suit is brought by the Insurance Company, and the Manufacturing Company: This is wrong. The Insurance Company claim by way of subrogation and not of assignment, so that they had no right to sue in their own name, and the suit could only be brought in the name of the Manufacturing Company. I need hardly say that the plea raised in para. 12 of the written statement is wholly misconceived and is in fact a complete reversal of the true position. What then is the position of an insurer who relies on the principle of subroga-



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tion? It is thus described by Lord Blackburn in *Burnand v. Rodocanachi* (1). "The general Law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land or any other contract of indemnity), and a loss happens, anything which reduces or diminishes that loss reduces & diminishes the amount which the indemnifier is bound to pay: and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to the recouped by having that amount back."

If then the Manufacturing Company had recovered damages from the Carrying Company before payment by the Insurance Company that, apart possibly from some special contract, would have diminished the money payable under the policy, and the Insurance Company would equally be entitled to the benefit of any amount recovered after payment by them of the policy money. Now this, when the errors of the plaint are eliminated, is a suit by the Manufacturing Company to recover damages from the Carrying Company and any matters that could be pleaded against the Manufacturing Company would be an effective answer though in truth the purpose of the suit was to benefit the Insurance Company *Simpson v. Thomas* (2). But then it is contended that in the special circumstances of this case the Insurance Company is even at a greater disadvantage because it is urged that both clause 10 of the agreement and also the terms of the policy stand in their way. I have already said that clause 10 does not extend to loss caused by negligence or criminal acts. It therefore affords no answer, so I need not consider whether in the absence of the memorandum and articles of association it could be reasonably assumed that the Manufacturing Company had power to enter into such a far reaching contract of indemnity or whether the clause comes within the mischief of section 23 of the Contract Act.

(1) (1882) L. R. 7 A. C. 333, 339. (2) (1877) L. R. 3 A. C. 279.



It thus only remains for me to deal with the contention based on the contents of the policy of insurance.

Now this policy was issued by the Insurance Company in favour of the Manufacturing Company and it contains the following stipulation "warranted no recourse against carriers." The Carrying Company attach considerable importance to these words and maintain that they amount to an absolute relinquishment by the Insurance Company of all rights by way of subrogation against them. But in my opinion this contention cannot be supported. These words were necessary to protect the Manufacturing Company against the possibility of an objection by the Insurance Company that there had been a concealment of the exemption in favour of the Carrying Company to the extent I have already indicated: but I can see no reason for reading them as equivalent to a relinquishment by the Insurance Company in respect of risks not so exempted. In that view they would not be a relinquishment of claims where the loss has arisen from negligence of the Carrying Company, its agents or servants. It therefore becomes unnecessary for me to discuss whether, if the words bore the meaning for which the Carrying Company argue, it would be open to that Company to rely on them seeing that they are not parties to the contract in which the words are contained, or the argument in this connection urged on behalf of the Carrying Company on the strength of what was said by Mathew J. in *Thomas & Co. v. Brown* (1). I have now dealt with all the points urged before us, for though it was unsuccessfully contended before Harington J. that the Carrying Company had not received the notice prescribed by section 10 of the Carriers' Act, the contention was expressly abandoned before us by Counsel for the defence. The result then is that we cannot uphold the judgment of Harington J. and must reverse the decree with costs here and in the Court of first instance. There is, however, a difficulty as to the damages be awarded in that there has been no proper proof on the point. It seems probable that both sides accepted the amount paid under the policy as correctly representing

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1910 the damages, but if they cannot agree as to this then there  
 ~ must be an enquiry; for though the plaintiffs ought to have  
 BRITISH AND proved the amount of damages at the hearing, it would not  
 FOREIGN must in the circumstances be right to visit their default in this  
 MARINE regard with the penalty of a dismissal of the suit.  
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 INDIA WOODROFFE J. I agree.  
 GENERAL  
 NAVIGATION *Appeal allowed.*  
 AND Attorneys for the appellant Companies: *Pugh & Co.*  
 RAILWAY Attorneys for the respondent Company: *Morgan & Co.*  
 Co., LD. J. C.

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and  
 Mr. Justice Woodroffe.*

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 July 12.

BRITISH AND FOREIGN MARINE INSURANCE  
 CO., LD.

v.

INDIA GENERAL STEAM NAVIGATION AND  
 RAILWAY CO., LD.\*

*Common Carriers—Notice of loss—Carriers Act (III of 1865) s. 10.—Waiver  
 of Notice.*

Under section 10 of the Carriers Act, before suit notice of loss must be given to the carrier by the plaintiff. Knowledge of the loss, derived *aliunde* by the carrier is not sufficient.

APPEAL by the plaintiff Companies from the judgment of Harington J.

This action was brought by the British & Foreign Marine Insurance Co., Ltd., and the Societe Generale Industrielle de Chandernagore (Societe Anonyme) against the India General Navigation and Railway Co., Ltd., as common carriers to recover the sum of Rs. 6,015 in respect of 250 bales of jute lost on the carriers' flat "Lemro." The relative position of the parties in this case were identically the same as in

\*Appeal from Original Civil, No. 53, of 1909.

*The British & Foreign Marine Insurance Co. v. The India General Navigation & Railway Co.* (1). There was a similar agreement between the mill and carriers; a similar bill of lading and a similar policy of insurance were issued by the carriers and the Insurance Company respectively. The facts too were the same with the single exception, viz., that in this case no notice of loss in writing was given to the defendant Company by either of the plaintiff Companies as had been done in the previous case by the letter of the 19th May, 1908.

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Harington J. dismissed this suit on the further ground that the notice required by section 10 of the Carriers Act had not been given. His Lordship observed:—

“In this case the plaintiffs have a further difficulty in their way. They have not proved any notice under section 10 of the Carriers Act.

The report of the agent, of February 27th, on which Mr. Pugh relies is not sufficient. The defendant is entitled to notice of the loss or injury to the plaintiff's goods.

The decision I have given in the first case is conclusive in this case, but I put my decision also on the further ground that the notice required by section 10 of the Carriers Act has not been given.

The action is dismissed with costs on scale No. 2.”

From this judgment the plaintiff Companies appealed.

*Mr. S. R. Das* (*Mr. B. L. Mitter* with him), for the appellants Companies. It is true no notice of loss was given by the plaintiffs in so many words. It is submitted (i) that the defendant Company must be taken to have had notice, and (ii) that the right to notice had been waived by the defendant Company. There is no doubt the defendant Company had knowledge of the loss: it is not necessary that notice should proceed from the plaintiffs. The letter of the 27th February, 1908, was sufficient. Again the tender of the proportionate share in the salvage proceeds amounted to waiver. The claim to notice can be waived. *Great Eastern Railway Co. v. Goldsmid* (2), *Selwyn v. Garfit* (3), *East India Railway Co. v. Jethmull* (4), *Manindra Chandra Nandi v. The Secretary of*

(1) (1910) I. L. R. 38 Calc. 28.

(3) (1888) L. R. 38 Ch. D. 273.

(2) (1884) L. R. 9 A. C. 927.

(4) (1902) I. L. R. 26 Bom. 669.

1910      *State for India in Council* (1), *Bank of Bombay v. Suleman Somji* (2) referred to.

BRITISH AND FOREIGN MARINE INSURANCE Co., LD.      *Mr. Jackson* (*Mr. B. C. Mitter* with him), for the respondent Company, was not called upon.

*Cur. adv. vult.*

v. INDIA GENERAL STEAM NAVIGATION AND RAILWAY Co., LD.      JENKINS C.J. In the suit out of which this appeal arises, the learned Judge, Mr. Justice Harington, has held that there was no such notice as is required by the Act. In my opinion that view was correct, nor is it possible to contend on the materials that are on the record that there was waiver of that notice. We must, therefore, so far as the decree in this suit is concerned confirm it and dismiss this appeal with costs.

WOODROFFE J. I agree.

*Appeal dismissed.*

Attorneys for the appellant companies: *Pugh & Co.*

Attorneys for the respondent company: *Morgan & Co.*

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(1) (1907) 5 C. L. J. 148.

(2) (1908) 8 C. L. J. 103, 109.

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.U.I.E., Chief Justice,  
and Mr. Justice Woodroffe.*

GREY v. CHARUSILA DASÍ.\*

1910

July 26.

*Official Trustee—Probate—Official Trustee's Act (XVII of 1864)  
ss. 8, 10, 32.*

The Official Trustee as constituted by Act XVII of 1864 is not entitled by virtue of his office and in his character as Official Trustee and in the name of Official Trustee to obtain a grant of probate.

*Ashbury Railway Carriage and Iron Co. v. Riche* (1) referred to.

APPEAL by C. E. Grey from an order of Fletcher J.

Akshoy Kumar Ghose died on the 23rd November, 1909, leaving a large estate and leaving him surviving his widow Sreemati Charusila Dasi and his nephew Bireswar Chandra Basu Mullick. On the 11th May, 1907, Akshoy Kumar Ghose had made and published his last will whereby he made the following provision for the appointment of his executor:—"I appoint the Court of Wards to be the executors and trustees of this my will. But should the said Court of Wards refuse to accept the said office or should the High Court refuse to grant probate to the said Courts of Wards, then I appoint the Official Trustee of Bengal to be the executor and trustee of this my will." The Official Trustee of Bengal was appointed trustee of the residuary estate, which was to be applied to certain charitable purposes.

The Court of Wards refused to accept the executorship. On the 3rd December, 1909, Mr. C. E. Grey, who was at the time officiating as Official Trustee of Bengal, in the absence on leave of Mr. A. B. Miller, and had been so officiating both at the date of the execution of the will and the death of the testator, applied for probate of the will. On the 7th December, 1909, the widow Sreemati Charusila Dasi applied for

\*Appeal from Original Civil, No. 39, of 1910.

(1) (1875) L. R. 7 H. L. 653.

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letters of administration with a copy of the will annexed. Citations were duly served on the Official Trustee of Bengal, the permanent incumbent Mr. A. B. Miller having in the meanwhile returned.

On the 17th December 1909, in *In the goods of Manik Lal Seal* (1) and order was passed by Fletcher J. for the revocation of the grant of probate, which had been made to the Official Trustee of Bengal in that matter on the ground that the Official Trustee was not competent to obtain such grant.

Thereupon certain correspondence ensued between the solicitors of Sreemati Charusila Dasi and Mr. A. B. Miller, in which the latter expressed his intention of not proceeding with Mr. Grey's application for a grant of probate of the will of Akshoy Kumar Ghose, and on the 22nd December the Official Trustee of Bengal through Counsel formally withdrew his petition for grant of probate.

On the 4th April, 1910, letters of administration with a copy of the will annexed were issued to the widow. Thereupon Bireswar Basu Mullick applied for the revocation of this grant and for an order that the will be proved in solemn form. On the 12th April the matter was directed to be set down as a contentious cause and the letters of administration was ordered to be brought into Court. On the 16th April the widow returned the letters of administration to the Registrar.

It appears that on the 24th January, 1910, the order of Fletcher J. in *In the goods of Manik Lal Seal* (1) was reversed by the Court of Appeal in *Official Trustee of Bengal v. Kumudini Dasi* (2), but the Appellate Court refrained from expressing an opinion whether a grant of probate could be made to the Official Trustee of Bengal.

On the 6th April, 1910, Mr. C. E. Grey again took over charge of the office of the Official Trustee of Bengal, and hearing of the order of the 12th April, and of the recall of the letters of administration, he applied on the 18th April, 1910, to be added as a party defendant in the contentious cause and for a three weeks' adjournment of the hearing. This applica-

(1) Unreported.

(2) (1910) I. L. R. 37. Cal. 387.

tion was refused. The will was duly proved in solemn form by the widow, and the letters of administration were directed to be re-issued to her. On the same date an *ex-parte* application had been made on behalf of Mr. Grey for leave to apply for probate, and he had been directed to serve notice on the widow. Thereupon Mr. Grey, through his solicitors, Messrs. Pugh & Co., filed a *caveat* with the Registrar.

On the 20th April, the widow's solicitors were informed by the Registrar that so long as the *caveat* filed on behalf of Mr. Grey was not discharged or taken off the file, the grant could not be re-issued to her.

Thereupon a summons was taken out on behalf of the widow asking that "the *caveat* filed by Mr. Grey, the Official Trustee of Bengal for the time being, be taken off the file as not having been properly filed, or in the alternative that the same may be discharged."

On the 25th April, 1910, Fletcher J. ordered the *caveat* to be discharged. After setting out the facts His Lordship continued :—

"The first point is in what capacity has the appointment of the Official Trustee of Bengal to be executor and trustee been made. Did the testator intend to appoint Mr. C. E. Grey, who by the way was not and is not the Official Trustee but was and is officiating as the Official Trustee of Bengal during the absence on leave of the Official Trustee or did he intend to appoint the Official Trustee of Bengal by virtue of his office as executor of his will. I have not the slightest doubt that the testator did not care anything about Mr. Grey whom it is quite possible he had never heard of but intended to appoint the Official Trustee of Bengal by virtue of his office to be executor of his will. That being so, I have to see whether the Official Trustee is authorised by virtue of the Act constituting his office to accept the office of executors. In my opinion he has not. Section 8 of his Act applies only to cases of deeds where the Official Trustee is named the trustee and is thereby appointed trustee. The second class of cases is where the Official Trustee is not appointed trustee but where no trustee has been appointed by deed or will or where the trustee appointed is unwilling or incapable of acting and the Official Trustee may be appointed the trustee by an order of the Court. The Act does not contain anything which suggests that the Official Trustee can be appointed an executor of a will. But it is said that the Official Trustee is a person and as a grant of probate or of letters of administration may be made to a person, there is, therefore, no reason why the Official Trustee fulfilling the description of a person should not be permitted to take out

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a grant and that there is nothing under his act to prevent him applying for probate. Such a construction of a statute would work a revolution. The principle that the Judges have laid down to be applied, since the case of *Ashbury Railway Carriage and Iron Co. v. Riche* (1) is that when dealing with a statute defining the powers of a corporation or of a person with statutory duties or powers one has to look at the statute to see what the duties are and only those duties which are conferred by the statute or are necessarily incident to the performance of the statutory duties are conferred on such corporation or person. That being so, the fact that the Official Trustee is a person is obviously not sufficient in itself to entitle him to perform the duties of executor. Under the description of person there are many classes, such as infants and lunatics, to whom a grant cannot be made. Similarly there are other persons whom the law does not desire should act as executors. Thus the Official Trustee is an officer with limited powers under his Act having only such powers as are necessary for the purpose of performing the duties of trustee but not of carrying out those of an executorship under a will. That being so, I am of opinion there is nothing in the Official Trustee's Act to authorise him to accept an executorship and unless I am shown words which expressly or by necessary implication authorise him to accept executorship, I am of opinion he is not entitled to have a grant of probate.

The only other point raised on the present application is whether Mr. Miller by his act has renounced the executorship. That point having regard to my decision on the first point need not be considered here. The present application is, therefore, successful and the *caveat* of Mr. C. E. Grey must be discharged and he must pay the cost of this application with the *caveat* certificate for Counsel."

From this order Mr. Grey appealed.

*Mr. C. R. Das* (with him *Mr. S. R. Das*), for the appellant.

*Mr. Jackson* (with him *Mr. B. C. Mitter*), for the respondent.

JENKINS C.J. Appeal No. 39 of 1910 relates to the estate of one Akshoy Kumar Ghose who died on the 23rd of November, 1909, having made a will of the 11th of May, 1909. The genuineness of this will has not been called in question, and the whole of this litigation is concerned with the question whether or not the Official Trustee is entitled to probate and whether the widow of the testator, who in the circumstances is his nearest heir, is entitled to letters of administration with the will annexed. Mr. Justice Fletcher has decided that the

Official Trustee is not entitled to probate, and he has granted letters of administration to the widow: and it is from his decision that this appeal is preferred.

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I am clear that the Official Trustee has no right to probate. To begin with, I read the letters contained in the affidavit and the action of the Official Trustee as a clear renunciation on his part. To read the letters otherwise and to give a different interpretation to his conduct would be, I think, little short of imputing bad faith to him. That I do not propose to do. The matter might be allowed to rest there because that would dispose of the Official Trustee, but I think, in the circumstances, it is desirable to proceed to the further question as to whether or not the Official Trustee is entitled by virtue of his office and in his character as Official Trustee and in the name of Official Trustee to have a grant of probate. I put the proposition in that form, because it cannot be seriously contended—and indeed was not seriously contended that there was any desire on the part of the testator to single out the individual incumbent of the office to be his executor. I feel no doubt that the testator's idea was to appoint the Official Trustee as such, and by that I mean the Official Trustee by virtue of his office, and by the name of his office and in no other sense. Now, was it open to the testator to appoint the Official Trustee as constituted by Act XVII of 1864 as executor of his will? In my opinion, it was not. The Act itself appears to afford the clearest answer on this point. It is described as an Act to constitute an office of Official Trustee, and it opens with a preamble in which it is said "It is expedient to amend the law relating to Official Trustee and to constitute an office of Official Trustee." The office is created for specific and definite purposes: it is the creature of the Act, and the incumbent of the office as such can only have such powers as are expressly or impliedly vested in him by the Act to which he owes his existence. Section 8 and section 10 indicate the conditions under which in ordinary circumstances the Official Trustee may become trustee

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of property. It is manifest that an application for probate does not come within either of those provisions. Then we have a supplemental provision in section 32 which indicates how in the particular events there set forth, an executor or administrator may pay to the Official Trustee the legacy or share of an infant or a lunatic, but that can only be done subject to certain conditions which clearly show that it is the scheme of the Act that the Official Trustee as such should not have the wide and unlimited powers that the argument addressed to us on his behalf would suggest. Then again, if the Act be examined, it will be seen that without exception the whole of its expressions are limited to the Official Trustee as a trustee and the property, over which he is to have control is regarded as trust property in the ordinary, proper and accepted sense of that term. There is in the Act as I read it no suggestion of the possibility of the Official Trustee as such being entitled to probate or letters of administration. Without going in detail through all the provisions of the Act, it is enough to say that it contains careful and elaborate provisions with a view to ensuring that the Official Trustee in the performance of his duties should be under vigilant and proper control. He has to furnish accounts which have to be examined; he has to keep books of accounts, he has to submit his account to creditors. But it is conceded that if the Official Trustee is entitled to probate and administration none of these precautions would be applicable to him in his character of executor or administrator under the terms of the Act; the very terms of the Act would be inapplicable to the position and the dealings of the Official Trustee as executor or administrator. Therefore it seems to me that not only is there no express provision in favour of the power to grant probate or letters of administration to the Official Trustee, but the whole scheme of the Act is opposed to the view that they can properly be granted to him.

It is unnecessary to refer to the cases or to deal seriously with the argument that the case of *Ashbury Railway Carriage and Iron Co. v. Riche* (1), does not decide that

which the House of Lords itself has held that it decided. The conclusion then to which I come is that the Official Trustee holds a public office created, regulated and defined by the Act, and that in his official capacity his powers are limited to those expressly or impliedly vested in him by the Act. I need not deal with the other difficulties that would arise in the particular circumstances of this case having regard to the position of Mr. Grey at the time when the will was made. It is sufficient for me, in answer to the broad question whether or not the Official Trustee is entitled to be executor administrator, to hold that he is not so entitled, and in this view the decree of Mr. Justice Fletcher should be confirmed and this appeal dismissed with costs.

It has been suggested to us that Mr. Justice Fletcher's order as to costs was harsh. I will say no more than that I see no reason for differing from him as to the order he has made with regard to the costs before him.

WOODROFFE J. I agree.

*Appeal dismissed.*

Attorneys for the appellant: *Pugh & Co.*

Attorneys for the respondent: *B. N. Basu & Co.*

J. C.

(1) (1875) L. R. 7 H. L. 653.

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## APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Vincent.

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July 27.

GOBIND PERSHAD

v.

HARIHAR CHARAN.\*

*Mortgage—Whether suit is maintainable on prior mortgages without reference to subsequent mortgage over the same property—Transfer of Property Act (IV of 1882), s. 85.*

A person having several mortgages over the same property is entitled to bring a suit on the earlier mortgages without joining in that suit his claim under the later mortgages.

*Kesharram Dadaaram v. Ranchhod Fakira* (1), *Dorasami v. Venkateshdayyar* (2), *Bhagwan Das v. Bhawani* (3) distinguished.

*Nattu Krishnama Chariar v. Annangaru Chariar* (4) referred to.

APPEAL by the plaintiff, Munshi Gobind Pershad.

This appeal arose out of a suit brought by the plaintiff to enforce six mortgage bonds. It appeared that the defendant No. 1, Lala Harihar Charan, borrowed on various dates from 1301 to 1306 F. S., Rs. 2,700 from the plaintiff by executing six mortgage bonds to him, all covering the same property. Defendants Nos. 2 to 4 were made parties inasmuch as they purchased a portion of the mortgaged property. The plaintiff's prayer was that he might be permitted to satisfy the debts due to defendants Nos. 2 to 4. In the plaint it was stated that the plaintiff held another mortgage for 100 Rupees, executed by the defendant No. 1 over the same property, and that he would sue defendant No. 1 on it afterwards. Defendant No. 1 admitted the bond but contended that there was no stipulation for payment of compound interest, and as such he was not liable to pay that interest. The other defendants, pleaded, *inter alia*, that the plaintiff's suit was liable to be dismissed inasmuch as he did not bring

\*Appeal from Original Decree, No. 168 of 1908, against the decree of Taraknath Dutt, Subordinate Judge of Bankipur, dated Jan. 31, 1908.

(1) (1905) I. L. R. 30 Bom. 156. (3) (1903) I. L. R. 26 All. 14.

(2) (1901) I. L. R. 25 Mad. 108. (4) (1907) I. L. R. 30 Mad. 353.

the suit on the seventh mortgage along with the suit brought by him on the six previous mortgages.

The Court below dismissed the plaintiff's suit holding that he was not entitled to bring the suit on the six earlier mortgages without joining in that suit his claim on the seventh mortgage.

Against that decision the plaintiff appealed to the High Court.

*Babu Umakali Mukherjee* (with him *Babu Joy Gopal Ghose*, *Babu Baldeo Narain Singh* and *Babu Chandra Shekhar Bannerjee*), for the appellant. The Court below was wrong in holding that the suit was not maintainable. The cases referred to in the judgment of the Court below are all distinguishable. In the case of *Keshavram Dulavram v. Ranchhod Fakira* (1), the mortgagee brought the suit on the subsequent mortgage; this clearly could not be done under the law. The case of *Dorasami v. Venkateshayaar* (2) is also distinguishable on the ground that there the plaintiff held two mortgages, one of which was a simple mortgage, and the other a subsequent usufructuary mortgage; the suit was brought on the simple mortgage with the object of selling the mortgaged properties subject to the lien on the usufructuary mortgage; this the Court held the plaintiff could not do. In the present case there is no such prayer of selling the property subject to the later mortgage. The case of *Bhagwan Das v. Bhawani* (3) is similar to the Madras case.

*Babu Kulwant Sahay*, for the respondents, contended that the Court below was right in holding that the suit was not maintainable. Regard being had to section 85 of the Transfer of Property Act, the previous mortgagee is bound to make the subsequent mortgagee a party to the suit brought by him on his previous mortgage. The cases referred to by the learned Subordinate Judge support the contention that the suit was not maintainable. The case of *Nattu Krishnama Chariar v. Annangara Chariar* (4) also supports me.

(1) (1905) I. L. R. 30 Bom. 156. (3) (1903) I. L. R. 26 All. 14.

(2) (1901) I. L. R. 25 Mad. 108. (4) (1907) I. L. R. 30 Mad. 353.

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BRETT AND VINCENT JJ. The present appeal arises out of a suit brought by the plaintiff to enforce six mortgage bonds, all covering the same property, and also for redemption of a prior mortgage held by the defendants Nos. 2, 3 and 4, covering only a portion of this property. It appears that the property, the subject of these six mortgages, was a 3 anna 4 dam share of village Satwaj appertaining to estate Ramporeteni. This share on a partition of the village being made by the Collector, was converted into a separate estate in 1903 or 1904. In consequence some of the earlier mortgages describe the property as a 3 annas 4 dam share of village Satwaj appertaining to estate Ramporeteni, while those of later dates describe it as 16 annas of estate Towji No. 693. The defendant No. 1, the mortgagor, did not dispute the mortgages or that the debts claimed thereunder were due from him, but he pleaded that the clause relating to compound interest was not enforceable as it was in the nature of a penalty. The defendants, Nos. 2 to 4, who are the purchasers of a 1 anna 4 dam share out of the 3 anna 4 dam share of Mouza Satwaj, really contested the suit, and they appear to have in their written statement raised every possible objection to the plaintiff's claim, alleging even that the mortgages were collusive and that the mortgagor had no title to the property mortgaged. Both parties went into evidence to support their respective allegations and the Subordinate Judge has dealt with the case in a very careful judgment. In the first instance, he has considered the plea advanced by the defendant No. 1 that compound interest cannot be recovered, and has held that that plea has no substance, and that, under the terms of the mortgage-deeds, the plaintiff is entitled to recover compound interest. That finding is not disputed in this appeal as the defendant No. 1 has not appeared to contest the decision of the lower Court on that point. The Subordinate Judge has then dealt in detail with the objections taken by the defendants Nos. 2 to 4 and has decided all the issues raised on these points in favour of the plaintiff. In this appeal, the findings of the Subordinate Judge are



only disputed with reference to his conclusion on issue No. 9. His conclusions on the other issues have not been assailed. The learned Subordinate Judge, however, after deciding all those objections in the plaintiff's favour held that the plaintiff's suit could not succeed, on the ground that, as the plaintiff had a seventh mortgage over the same property subsequent to the six mortgages on which the suit had been brought, therefore he was bound to sue on that mortgage in the present suit, and that, as he had omitted to do so, the suit must fail. He accordingly dismissed the plaintiff's suit, but, holding that all the objections raised by the defendants were unsound, he ordered that the plaintiff should only pay one half the costs in the suit.

The plaintiff has appealed and the main point in support of the appeal which has been argued is, that the Lower Court was wrong in the view which it took that the plaintiff's suit was not maintainable by reason of the fact that he had not included in it his claim under the seventh and latest mortgage. On behalf of the respondents an objection has been taken to the findings of the Subordinate Judge on the 4th issue, that the defendants Nos. 2 to 4 are only entitled to be paid by the plaintiff in redemption of their mortgage on the 1 anna 4 dam share the sum of Rs. 1,000.

The learned Subordinate Judge, in arriving at the conclusion that the suit was not maintainable, relied on the following cases. The first is the case of *Keshavram Dulavram v. Ranchhod Fakira* (1). In that case what was laid down was that where a mortgagee holds two mortgages on the same property executed by the same person he cannot maintain a suit to recover the sum due on the later mortgage only by sale of the property subject to the prior mortgage. In the present case, the plaintiff brought the suit on the prior mortgages to recover the mortgage debts due on them, and at the same time stated that he had a seventh mortgage but that he had not sued on it in that suit. He did not in his plaint ask for a decree for the sale of property covered by the six mortgages,

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subject to the later mortgage, and, in our opinion, he would certainly not have been entitled to ask for any such relief. All that he sought for in the suit was a decree on his six mortgage bonds for the recovery of the debts due under them by sale of the property mortgaged. This case, therefore, of the Bombay High Court on which the Subordinate Judge has relied has, in our opinion, no bearing on the present case. In that case, the mortgagee sought to recover the sum due on the later mortgage by sale of the property subject to the prior mortgage and the learned Judges held that the mortgagee was not entitled to bring the property to sale in satisfaction of the later mortgage and at the same time to retain on the property the mortgage lien under the first mortgage. This is not what the mortgagee in the present suit seeks to do and the case therefore in question is no authority for the view which the learned Subordinate Judge has taken.

The second case relied on is that of *Dorasami v. Venkateshayyar* (1). That case is, however, entirely different from the present case. There the plaintiff, who was a simple mortgagee of certain land, also held a subsequent usufructuary mortgage over the same land, and he brought a suit on the earlier mortgage with the object of selling the mortgage property subject to the lien under the usufructuary mortgage which would have entitled him to retain possession of the property sold. The learned Judge held that the plaintiff was not entitled to bring a suit to enforce the prior mortgage subject to the subsequent mortgage existing in his favour. In the present case, however, there is no prayer on behalf of the plaintiff for a decree for sale of the property under the six mortgages subject to the seventh mortgage.

In the case of *Bhagwan Das v. Bhawani* (2), on which the learned Subordinate Judge also relies, the facts are similar to those in the case of *Dorasami v. Venkateshayyar* (1),

(1) (1901) I. L. R. 25 Mad. 108. (2) (1903) I. L. R. 20 All. 14.

already referred to. There the plaintiff having several simple mortgages over the properties and an usufructuary mortgage over one of them brought a suit to bring to sale all the properties covered by the simple mortgages subject to the usufructuary mortgage held by him, and the learned Judges held that he was not entitled to bring such a suit. This, however, as we have already observed, is not the case in the suit before us.

In the case of *Nattu Krishnama Chariar v. Annangara Chariar* (1), the learned Judges distinctly stated in their judgment that there was nothing in law to prevent a plaintiff from bringing a suit on a prior mortgage without reference to a subsequent mortgage held by him and obtaining a decree for sale of the mortgaged property in satisfaction of the first mortgage and free from the second mortgage. So far as we are able to judge from the pleadings this is what the plaintiff has asked in the present case. He has no doubt stated that he holds a seventh mortgage on the property, but he has asked for the sale of the property in satisfaction of his mortgage debt on the six prior mortgages and this sale, under the law, must be free from the subsequent mortgage. What effect the sale of this property in satisfaction his six prior mortgages will have on his right or power to recover under the seventh mortgage can only be determined in a suit (supposing the plaintiff brings one) on the seventh mortgage. In our opinion, there is nothing in the law nor is there any authority to support the view taken by the learned Subordinate Judge that, when a plaintiff has seven mortgages on the same property, he is not entitled to bring a suit on the six earlier mortgages without joining in that suit his claim under the seventh mortgage. In our opinion, therefore, the finding of the Subordinate Judge in this point cannot be maintained and the ground on which he refused to decree the plaintiff's suit can not be supported.

We have now to consider the point taken on behalf of the respondents. It is urged that the Subordinate Judge

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was wrong in the view which he took that, in order to recover the mortgage of the defendants Nos. 2 to 4 on the 1 anna 4 dam share of Mouza Satwaj, the plaintiff was only liable to pay the sum of Rs. 1,000. It has been contended that the plaintiff ought to be directed to pay not only the sum of Rs. 1,000, for which the defendants Nos. 2 to 4 purchased the property on the 2nd October 1907, in satisfaction of their mortgage decree for Rs. 817, but also the sum of Rs. 621-1-3, the amount due to them from Jhamala Koer on account of a decree obtained against her in respect of sums paid by them for maintenance to Parbati Koer, the mother of Jamala Koer. In support of this contention, the learned pleader for the respondents has invited our attention to the sale certificate obtained by his client on the 2nd October 1907. In that certificate all that is stated is that the share was put up to sale in satisfaction of a decree obtained by the defendants Nos. 2 to 4, and at the same time it was mentioned that those defendants had brought a suit to recover Rs. 653-11-6, besides costs against the same judgment-debtor, which suit at the time of the sale was pending disposal. It is suggested that, in consequence of that recital in the certificate of sale, it must be held that the defendants Nos. 2 to 4, as they had to pay that sum on behalf of the original properties of the share, are entitled to recover it from the plaintiff as a mortgage or charge on that share. The learned Subordinate Judge has held that the defendants Nos. 2 to 4 are not entitled to recover that additional sum and we think that the view which he has taken is correct. In the first place, there is nothing to show whether that debt was a mortgage debt or not, and in the second place, as the learned Subordinate Judge has pointed out, all that the decree would have given the defendants was a right to sell the property over again in order to recover the debt. In these circumstances, we think that the learned Subordinate Judge was right in holding that, in the present suit, he could not direct that the plaintiff should redeem the mortgage of the defendants Nos. 2 to 4 by paying that sum of Rs. 621-1-3 in addition to the sum of Rs. 1,000.

The result, therefore, is that we set aside the judgment and decree of the lower Court, and, as we hold, differing from that Court, that the plaintiff's suit was maintainable, we direct that an account be taken of the amount due to the plaintiff on his six mortgages, and that a decree be passed to the effect that, if that amount be not paid within six months from the date of the preparation of the decree, the mortgaged property will be liable to be sold. The plaintiff will also be bound to pay to the defendants Nos. 2 to 4 the sum of Rs. 1,000 due to them, and, if that sum be paid within the time aforesaid, the mortgaged property will be sold in satisfaction of the amount due to the plaintiff under his mortgage decrees *plus* the amount paid by him for redemption to the defendants Nos. 2 to 4. If the sum of Rs. 1,000 be not paid by the plaintiff within the time stated, the share of 1 anna 4 dams purchased by defendants Nos. 2 to 4 will be expected from sale, and the plaintiff will be entitled to recover his mortgage debt by sale only of the 3 annas 4 dams share less the 1 anna 4 dams share of the defendants Nos. 2 to 4.

The plaintiff-appellant is entitled to recover his costs of his appeal from the defendants Nos. 2 to 4 and of the Lower Court from all the defendants. Such costs will be added to the mortgage security.

*Appeal allowed.*

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## CRIMINAL REVISION.

*Before Mr. Justice D. Chatterjee and Mr. Justice Teunon.*

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Aug. 9.

HARI CHARAN GORAIT

v.

GIRISH CHANDRA SADHUKHAN.\*

*Magistrate, power of—Order to police to take possession of account books the subject of an offence without summons to produce or search warrant issued—Legality of order—Reference of case after local investigation to a Magistrate for inquiry and report—Irregularity—Quashing pending proceedings—Criminal Procedure Code (Act V of 1898), ss. 94, 96, 192, 202,—Valuable security—Title page of account book containing names and shares of the partners signed by them—Penal Code (Act XLV of 1860), s. 30.*

A Magistrate may, on taking cognizance of a complaint, issue either a summons under s. 94 or a search warrant under s. 96 of the Criminal Procedure Code, but is not competent to pass an order directing the police to take possession of account books forming the subject of the charge.

If the Magistrate, after first having examined the complainant under s. 200, is not satisfied that process should issue, he can, under s. 202, either hold an inquiry and take evidence himself, or direct a "local investigation" by a subordinate officer. After ordering a police investigation, he may, if dissatisfied with the materials, personally make a further inquiry and take evidence, or direct a further "local investigation," but not an inquiry and report by another Magistrate. If he thinks it proper to send the case to a Magistrate for inquiry, other than a "local investigation," he should transfer it under s. 192 to the latter for disposal, and not for a report.

Where the complainant made no specific allegations of facts in the complaint, but stated in his examination on investigation under s. 202 that when the *jabda* books were first opened, the title pages contained the name of his son as a partner, and that he later discovered that a substitution of pages had been made showing the name of his father-in-law as a partner, and the statements in the complaint and such examination were not consistent as to the names originally entered, and he was contradicted by his only witness in several particulars, and his story was not supported by the original deed of partnership or the payment of the contributions, it was held that the proceedings must be quashed as the materials before the Magistrate disclosed no offence.

\*Criminal Revision, No. 835 of 1910, against the order of D. Swinhoe, Officiating Chief Presidency Magistrate of Calcutta, dated June 7, 1910.



*Jagat Chandra Muzumdar v. Queen-Empress* (1), *Choa Lal Dass v. Anant Pershad Misser* (2) and *Chandi Pershad v. Abdur Rahaman* (3), referred to.

*Semble*: A title page in an account book containing the names of the partners and the amount of the capital contributed by each is, if signed by them, a "valuable security" within s. 30 of the Penal Code.

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ON the 3rd February 1910, Girish Chandra Sadhukhan filed a complaint on behalf of his minor son, Nagendra Nath Sadhukhan, and two daughters before the Chief Presidency Magistrate alleging that his wife, Panna Moyee Dassee, the daughter of Hari Dass Sadhukhan, entered into a partnership with the accused, Hari Charan Gorait, and Basant Kumar Sadhukhan, and with Uma Churn Sadhukhan, the deceased father of the accused Khetter Mohun Sadhukhan, in a mustard oil business, and invested Rs. 14,000 therein becoming a  $4\frac{1}{2}$  as. co-sharer; that after her death her son and two daughters became partners as her heirs, and their names were entered as such in the title pages of all the partnership books of account; that during the lifetime of Hari Dass, *viz.*, up to November or December 1909, the accused did not tamper with the *khata* books of the business or deny him inspection of them, but that they had now in collusion with the maternal uncles of Johur Lal, the son of Hari Dass, combined and conspired fraudulently to cause injury to his own minor children by tampering with the books, and had already tampered with some of them and were busy tampering with the rest of them. The Chief Presidency Magistrate, after examining the complainant, endorsed the following order on the complaint:—"C Town to inquire and report and take possession of the *khata* books." The local police thereupon seized all the books of account and the Sub-Inspector submitted a report, on the 7th instant, to the effect that the papers and the books of the firm showed that Nagendra had a share in the business, and that the *jabda* for 1314 B.S. had the appearance of being tampered with.

(1) (1899) I. L. R. 26 Calc. 786. (2) (1897) I. L. R. 25 Calc. 233.

(3) (1894) I. L. R. 22 Calc. 131.

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The Chief Presidency Magistrate then ordered Babu Moni Lal Bannerjee, an Honorary Presidency Magistrate, on the 18th March, to hold an inquiry and submit a report. The latter, after examining the complainant, one Panch Kouri Sadhukhan and two police officers, sent up a report, under s. 202 of the Criminal Procedure Code, on the 6th June, stating that the charge was not entirely devoid of foundation and that, at any rate, the prosecution had made out a *prima facie* case under s. 477 of the Penal Code. The Chief Presidency Magistrate then issued summonses on the accused, the next day, under s. 477, I. P. C., whereupon the accused moved the High Court and obtained the present rule.

The complainant's case, as disclosed in the counter affidavit to the High Court, was that his wife Panna Moyee received a gift of Rs. 14,000 from her father on behalf of her son Nagendra, and invested the amount in the latter's name as a partner; that the agreement of the 11th April, 1907, referred to below, was not genuine; that on the 5th Baisak 1314, when the account books were opened, the first page of the *jabda* contained the name of Nagendra as a partner, which was fraudulently altered to that of Hari Dass, and that this was the matter he had complained of in the Police Court. The accused in their application to the High Court alleged that, on the 11th April 1907, a deed of partnership was entered into between Hari Dass, Uma Charan, Hari Charan Gorait and Basant Kumar, the first three of whom subscribed Rs. 14,000 each, and the fourth Rs. 8,000; that the title page of the *jabda* for 1314, opened on the 5th Baisak 1314, contained their names and specification of their shares in the business; that in Chaitra 1314, the name of Nagendra was substituted *benami* for Hari Dass; that Hari Dass died on the 31st October 1909, and that his heir Johur Lall was thereupon entered as a partner. They also alleged that neither Panna, who died in Bhadra 1314, nor her son or daughters ever had a share in the business.

*Mr. A. Chaudhuri* (with him *Babu Manindra Nath Bhattacharji*), for the petitioner.

Mr. Asghur (with him Babu Jnanendra Nath Sarkar),  
for the opposite party.

Cur. adv. vult.

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CHATTERJEE AND TEUNON JJ. In this case a rule issued calling upon the Chief Presidency Magistrate to show cause why certain proceedings should not be quashed on the ground that the materials before him did not disclose any offence within section 477 of the Indian Penal Code; that the sending of the case to the Honorary Magistrate was without jurisdiction, and that under the circumstances the order for seizure of the books ought not to have been made.

The facts are that, on the 3rd of February, one Girish Chandra Sadhukhan acting professedly on behalf of his minor son, Nagendra Nath Sadhukhan, and two infant daughters, made to the Chief Presidency Magistrate a complaint to the effect that in Baisak 1314, corresponding with April 1907, his wife Panna Moyee Dasse had entered into partnership with the three accused, that on her death her interest had devolved upon her children, and that on the death of her father, one Hari Dass Sadhukhan, in Aghran, that is November-December 1909, the three accused acting in the interests of Hari Dass' son Johur Lal had fraudulently tampered with the account books of the partnership business.

In accordance with the prayer of the petition the Chief Presidency Magistrate on this complaint directed the Town Police "to inquire and report and to take possession of the *khata* books" meaning thereby the *jabda* (or day books) and the *khatians* (or ledgers) for the years 1314 and 1315. The investigating police officer submitted his report on the 7th of February.

Thereafter, on the 18th of March, being apparently not satisfied with this report, the Magistrate next referred the case to an Honorary Magistrate for further enquiry and report. The Honorary Magistrate examined the complainant and his three witnesses, *viz.*, one Panch Kouri Sadhukhan and two police officers, and, on the 6th June, reported that the charge was not "utterly devoid of foundation."

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On this report, on the 7th of June, the Chief Presidency Magistrate directed the issue of process for the attendance of the accused to answer a charge under section 477 of the Indian Penal Code. It is against this order that the present rule is directed.

On behalf of the petitioners two objections, which may be described as preliminary objections, are taken to the procedure adopted by the Chief Presidency Magistrate. It is contended in the first place that the order upon the police to take possession of the account books of the firm is illegal. It is not disputed that this contention is well founded, and it is clear that, if the Chief Presidency Magistrate considered that the production of the account books was necessary, he should have issued either a summons to produce under the provisions of section 94 of the Criminal Procedure Code, or a search warrant under the provisions of section 96. Beyond observing that, if the regular procedure had been followed, it is probable that the parties would have been spared the inconvenience caused by the seizure of the account books for the current year, 1316, we need not refer to this matter further.

In the next place it is contended that the order of the 18th of March directing a Subordinate Magistrate to enquire and report is one not authorised by law. This also is a proposition that cannot be disputed. If, having first examined the complainant under the provisions of section 200 of the Code of Criminal Procedure, the Magistrate was not satisfied that the case was one in which process should issue, he was competent, under section 202, either to hold an inquiry and decide the matter upon evidence taken by himself, or to direct the making of a "local investigation" by some Subordinate officer. Having directed such an investigation by a police officer, and having considered the result thereof, it was still open to him, in our opinion, if dissatisfied with the materials obtained, to direct a further local investigation or personally to make further inquiry and take evidence in the case. But if he thought proper to refer the case to some

other Magistrate for an inquiry, other than a local investigation, he should, in our opinion, have transferred the case under section 192 of the Criminal Procedure Code to such Magistrate not for report but for disposal.

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But no application having been made to this Court against the order of the 18th March, though we are sensible that, as the result of the delays flowing from this order, the parties in this case have been seriously harassed, we are not of opinion that by reason of this intermediate irregularity we should set aside the regular proceedings initiated by the order of the 7th of June.

This brings us to the substantial question involved in the rule, namely, whether on the materials before the Magistrate this prosecution should be permitted to continue.

In the first place, it may be observed that in his petition the complainant made no specific allegation, but that under examination by the Honorary Magistrate his complaint resolved itself into this, that when the *jabda* or day books of 1314 and 1315 were opened the title pages prefixed to those books showed the name of Nagendra Nath Sadhukhan as one of the four partners, and that after a short absence from the place of business he, on the 20th Magh, i.e., the 2nd of February 1910, discovered that for the original title-pages had been substituted title pages containing not the name of Nagendra but in place thereof the name of Hari Dass.

As at present advised we are not prepared to say that a title page containing the names of the several partners and showing the amount of capital contributed by each, if signed by the partners, would not be a "valuable security" within the meaning of section 30 of the Indian Penal Code, but neither the complainant nor his witness Panch Kouri say that the title pages in question were so signed.

But on behalf of the complainant it is urged that it is open to a Magistrate, at any stage of the proceedings, to alter or modify the charge, and it has been suggested that the substitution of the title pages, if established, may constitute, if not the offence punishable under section 477, yet some other

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offence punishable under some other section of the Code, for instance, the offence of fabricating false evidence.

We have, therefore, thought it necessary to examine more closely the materials on which the Magistrate's order is based.

As we have already stated the complaint contains no specific allegation, yet if the complainant made the discovery he speaks of on the 2nd of February there is no apparent reason why in his petition of the 3rd of February he should not have made a clear statement on the point.

Further, while the petition states or implies that the name originally entered in the books was Panna Moyee's, and that on her death (in 1314) the names of her three children were substituted, in their statement to the Honorary Magistrate both the complainant and his one witness Panch Kouri ignore the two daughters. The witness Panch Kouri again, the only witness whom the complainant was able to produce, contradicts him in several particulars.

The deed of partnership shows that Hari Dass was one of the four original partners, and the accused explain that the subsequent substitution in the books of the name of Nagendra, who is a boy of four, was a mere *benami* transaction. Thus the real question in dispute between the parties is whether Hari Dass' share has devolved upon his son Johur Lal or was transferred to his daughter Panna Moyee or to her son Nagendra.

The complainant admits that the sum in question, Rs. 14,000, was contributed by Hari Dass, and says Hari Dass made a gift of this sum to Panna Moyee or to her son Nagendra. But in support of this he can point to nothing but the substitution of names. In this state of facts, though we are fully alive to the danger of interfering with cases while they are still pending in the Subordinate Courts, we think that this case falls substantially within the rule laid down in the cases of *Jagat Chandra Mozumdar v. Queen Empress* (1), *Choa Lal Dass v. Anant Pershad Misser* (2), and *Chandi Pershad v. Abdur Rahman* (1), and that no

(1) (1899) I. L. R. 26 Calc. 786. (2) (1897) I. L. R. 25 Calc. 233.



useful purpose would be served by the continuance of these proceedings. We, therefore, set aside the order of the 7th of June, and direct that this prosecution be quashed.

E. H. M.

*Rule absolute.*

(1) (1894) I. L. R. 22 Calc. 131.

## APPELLATE CRIMINAL.

*Before Mr. Justice Harington, Mr. Justice Mookerjee and  
Mr. Justice Teunon.*

SURENDRA NATH GHOSE

*v.*

EMPEROR.\*

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Aug. 12.

*Forgery—Making a false document—“Dishonesty or fraudulently,” meaning of—  
Alteration of document in a material part thereof—Affixing one’s signature to  
document not required by law to be attested after execution and registration—  
Using a forged document—Penal Code (Act XLV of 1860), ss. 24, 25, 463, 464,  
and 471.*

Where the accused affixed his signature to a kabuliat, which was not required by law to be attested by witnesses, after its execution and registration, below the names of the attesting witnesses but without putting a date or alleging actual presence at the time of its execution:

*Held*, that such act did not fall within the first clause of s. 464 of the Penal Code inasmuch as, although it may have increased the apparent evidence of its genuineness, it was not done “dishonestly” or “fraudulently” within ss. 24 and 25; and further that it did not justify the inference that he intended it to be believed that the document was made or signed at a time when he knew it was not made or signed, but was consistent with the hypothesis that he intended it to be believed that he would be able, if called as a witness, to prove its genuineness.

The expression “*intent to defraud*” implies conduct coupled with an intention to deceive and thereby to injure. The word “*defraud*” involves two conceptions, *viz.*, deceit and injury to the person deceived, that is, an infringement of some legal right possessed by him, but not necessarily deprivation of property.

\* Criminal Appeal, No. 345 of 1910, against the order of L. Palit, Sessions Judge, Jessore, dated March 25, 1910.

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SURENDRA

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v.

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*Queen-Empress v. Muhammad Saeed Khan* (1), *Queen-Empress v. Abbas Ali* (2), *Abdul Rajah v. Queen-Empress* (3) and *Reg. v. Toshack* (4) referred to:

*Held*, further, that the interpolation of the name of a witness as an attester subsequent to the execution of a document which need not be attested, is not a material alteration thereof within the second clause of s. 464.

*Mohesh Chunder Chatterjee v. Kamini Kumari Dabia* (5), *Venkatesh Prabhu v. Baba Subraya* (6), *Fazzer Ali v. Surya Narain* (7), *State v. Gherkin* (8), *Blackwell v. Lane* (9) approved of.

*Suffel v. Bank of England* (10) and *Reg. v. Asplin* (11) explained and distinguished.

*Sitaram Krishna v. Daji Devaji* (12) dissented from.

The test of the materiality of an alteration in a document is not an addition stating a falsehood made expressly or by implication in order to increase the apparent evidence of its genuineness, but one which alters the legal identity or character of the instrument either in its terms or in the relation of the parties to it.

THE appellant was tried before the Sessions Judge of Jessore with a jury on two charges under section 471 of the Penal Code, and convicted and sentenced thereunder, on the 25th March 1910, to two years' rigorous imprisonment on each charge, the sentences being concurrent.

It appeared that in the course of a proceeding under s. 145 of the Criminal Procedure Code, in which the appellant was one of the first party, he filed, in the Court of the Sub-divisional Magistrate of Jhenida, two raiyati kabuliats, on the 4th July 1909, which were made exhibits on the 4th August following, each containing, among other signatures under the heading of *ishadi* or attesting witnesses, his own name in a corner of the document. There was, however, no date entered and no direct allegation made that the appellant was present at their execution. The kabuliats were genuine documents, but did not bear the appellant's name when executed on the 15th

(1) (1898) I. L. R. 21 All. 113.

(7) (1891) 1 Mad. L. J. 388.

(2) (1896) I. L. R. 25 Calc. 512.

(8) (1847) 7 Iredell. N. C. 206.

(3) (1895) P. R. Cr. 2.

(9) (1838) 4 Dev. and Bat. 113:

(4) (1849) 4 Cox. C. C. 38.

32 Am. Dec. 675.

(5) (1885) I. L. R. 12 Calc. 313.

(10) (1882) 9 Q. B. D. 555.

(6) (1890) I. L. R. 15 Bom. 44.

(11) (1873) 12 Cox. C. C. 391.

(12) (1883) I. L. R. 7 Bom. 418.

March and 3rd April 1898, and registered on the 15th April of the same year. On the 1st September 1909, certified copies of the kabuliats were obtained from the Registration Office which did not bear the appellant's signature. When these copies were compared with the kabuliats filed in Court it was observed that the corners of the latter, where the appellant's signature had been written, were torn out. It was alleged by the prosecution that at some period between the police investigation which led to the s. 145 case and the hearing before the Magistrate, the accused had signed the kabuliats with the intent that it should be believed that he had witnessed their execution.

The appeal was first heard by Harington and Teunon JJ., and their Lordships differed in opinion. The dissentient judgments were as follows:

HARINGTON J. This is an appeal preferred by one Surendra Nath Ghose against the conviction and sentence passed on him under section 471 of the Indian Penal Code, on his trial before the learned Sessions Judge of Jessore and a jury.

On the facts it appears that the appellant, in the course of a proceeding under section 145, produced and filed two kabuliats. Each kabuliat had written in one corner of it the appellant's name, and there is evidence that it was written in the appellant's hand.

The kabuliats were genuine documents. It was the case for the Crown that, between the time of the police investigation which resulted in the section 145 proceedings and the hearing before the Magistrate, the appellant placed his name on the document with the intent that it should be believed he had witnessed the document, and that, it is said, makes the document a forged document and brings him within the provisions of s. 471.

Before the trial the corners of the documents where the name had been written had been torn off: but it is conceded that nothing but the name appeared, and there was no date, and no allegation that the writer had been present at the execution of the document.

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J.

First it is contended for the Crown that in writing his name on the document the appellant had made it to appear that he was a witness to the execution of the document, which he was not, and so had "fraudulently altered the document in a material part thereof," and had thus made a false document within the second clause of section 464.

I do not agree with this contention. First the document was not required by law to be attested, so that, even if the placing of the appellant's signature on the document can be regarded as a statement that he has attested the document, even then I think he could not be said to have altered the document "in a material part thereof."

The document remained precisely the same: the addition of the appellant's name did not affect or vary the contract between the parties expressed in the kabuliats, and whether the appellant's name, or any one else's name were written in the corner or not, the document would be just as much binding between the parties, and just as much proveable in a Court of Law.

The respondent relied on the case of *Sitaram Krishna v. Daji Devaji* (1), but that case which professed to follow *Suffel v. Bank of England* (2), has been expressly dissented from in the later case of *Venkatesh Prabhu v. Baba Subraya* (3), and *Mohesh Chunder Chatterjee v. Kamini Kumari Dabia* (4). The latter case is a direct authority for the proposition that the interpolation of the name of a witness in a document which need not be attested is not a material alteration which would make the instrument void. With that case I agree: and in my view an alteration, which does not purport to affect the terms of the contract, or its identity or its validity, is not an alteration in a material part thereof.

In *Suffel v. Bank of England* (2), the question was whether the alteration of the number of a Bank of England note was a material alteration: it was decided that it was. But, as is explained by Wilson J., in *Mohesh Chunder*

(1) (1883) I. L. R. 7 Bom. 418.

(2) (1882) 9 Q. B. D. 555.

(3) (1890) I. L. R. 15 Bom. 44.

(4) (1885) I. L. R. 12 Calc. 313.

*Chatterjee v. Kamini Kumari Dabia* (1); the decision turned on the fact that a Bank of England note is not a mere contract but is a part of the currency of the realm, and that the number was *qua* the currency of the realm a very material part of the note.

Next, it may be said that the signature of the appellant alone is a "document" within the definition of the Indian Penal Code, and that, being placed below the word "witnesses" on the document, it amounts to a statement that the appellant witnessed the execution of the kabuliat, and that if this be so, this signature is a false document, and the false document having been made to support a claim under section 145, the appellant has committed forgery as defined by section 463, and in using the document has brought himself within the provisions of section 471.

For the purpose of Chapter XVIII of the Indian Penal Code an explanation of the expression "making a false document" is to be found in section 464. Under the first clause of that section, a man makes a false document who makes or signs a document (*i*) intending it to be believed that it was made, signed or executed by, or by the authority of, some person by whom, or by whose authority, he knows it was not made or signed, or (*ii*) if he makes it with the intent that it shall be believed that it was made or signed at a time when he knows it was not so made or so signed. As to the first clause, no question arises in this case, because the appellant wrote his own name. But as to the second clause, the fact that the appellant wrote his own name on the document even as a witness does not in my view justify the inference that he intended it to be believed that the document was made, or his signature put, at a time when he knew it was not made or signed so as to bring the case within the second sub-clause of section 464.

The document in question is a Bengali kabuliat. No date is appended to the signature of the appellant, nor is there any statement that the appellant was present when the document was executed.

(1) (1885) I. L. R. 12 Calc. 313.

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Having regard to the nature of the document, the only intention which, I think, can be legitimately inferred from the placing by the appellant of his name on the document is the intention that it should be believed that, if he were called into the witness-box, he would be able to prove the genuineness of the kabuliat. That might be by having been present either at the execution or on some occasion subsequent to the execution when the person to be bound by the kabuliat had acknowledged the genuineness of his signature and that he had executed the document.

No doubt if the appellant came into the box and swore falsely that he had been present at the execution, or that the execution had been admitted in his presence, he would be liable to be convicted and punished for the crime of perjury. But if the only intention which can be legitimately inferred is the intent to induce a false belief that he could prove the document when examined as a witness, then I think he has not made a false document within the provisions of section 464 of the Indian Penal Code, because such an intention does not fall under any sub-clause of that section. Then if he has not made a false document within that section the conviction under section 471 of the Indian Penal Code cannot stand.

In my opinion the Judge in this case has misdirected the Jury. He should have told them that the interpolation of the appellant's name as a witness, assuming that they were prepared to find that the appellant had interpolated his name, was not an alteration of the document in a material particular within the provisions of section 464, sub-section (2). And further, I think he should have directed them that there was no evidence on which they could find an intent other than an intent that it should be believed that the accused was able, if called as a witness, to prove the document, and that, however dishonest that intent, it did not come within section 464 so as to make the document a "false document" within that section.

The result is, I think, that there ought to have been an acquittal in this case, and that the conviction was brought



about by a misdirection of the jury on this point. I, therefore, consider that the appeal should be allowed, the conviction and sentence set aside, and the prisoner acquitted.

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TEUNON J. In this case it appears that in proceedings under section 145 of the Criminal Procedure Code, in the Court of the Sub-divisional Magistrate of Jhenida, the present appellant, who was one of the first party to the said proceedings, produced and used two documents. The documents, two kabuliats, were filed on behalf of the first party on the 4th of July and were made exhibits on the 4th of August 1909.

When produced and used, below the word "*ishadi*," that is, "attesting witnesses," the documents contained, with other signatures, the signature of the appellant. Suspicion having been aroused, the second party to the section 145 proceedings obtained from the Registration Office certified copies of the two documents, and in neither of these copies does the signature of the appellant appear.

The copies were produced in Court on the 1st September 1909, and when the two kabuliats were thereupon examined, it was found that in each of them the portion containing the signature of the appellant had been removed.

The appellant's prosecution was thereupon directed, and the committing Magistrate, being of opinion that at some period subsequent to the execution and registration of the documents the signature of the appellant had been dishonestly or fraudulently inserted as the signature of a witness who had attested the execution of the documents, committed him to take his trial on two charges under section 471 read with section 465 of the Indian Penal Code, *i.e.*, of dishonestly or fraudulently using as genuine a document which he knew to be forged.

He was tried by the learned Sessions Judge of Jessore with the aid of a jury, and has been convicted on both charges, and sentenced on each charge to two years' rigorous imprisonment, the sentences to run concurrently. Hence this appeal.

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The kabuliats in question are documents which in law do not require attestation, and in the appeal the one contention on behalf of the appellant is that the names or signatures of the attesting witnesses are not a material part of the document, and that, therefore, the fraudulent insertion or addition of a signature purporting to be the signature of an attesting witness does not constitute the making of a false document within the meaning of section 464 of the Indian Penal Code.

This contention has reference to the second clause of section 464 which in substance provides that a person is said to make a false document when he fraudulently makes an alteration in any material part thereof.

In support of this contention reliance is placed on the cases of *Mohesh Chunder Chatterjee v. Kamini Kumari Dabia* (1), and *Venkatesh Prabhu v. Baba Subraya* (2). In these cases, in suits brought by one party to a contract against the other party thereto, it was held, and no doubt correctly held, that in the case of instruments which do not require attestation, the unauthorised addition of a name or names to those of the attesting witnesses was not an alteration so material as to vitiate the instrument and render the contract contained therein unenforceable.

The reply of the Crown to the appellant's contention is two-fold. In the first place it is urged that though a fraudulent addition to the names of the attesting witnesses may not vitiate the instrument as between the parties thereto, yet when the document is used against a third person for an ulterior purpose, as in this case, to prove possession of a certain parcel of land, the names of the attesting witnesses, that is, the apparent evidence of the genuineness of the document is a material part thereof, and an alteration which goes to increase that apparent evidence is a material alteration.

In the second place reference is made to the first clause of section 464 which provides that when a person fraudulently

makes a part of a document with the intention of causing it to be believed that such part was made at a time at which the maker knew that the said part was not made, such person is said to make a false document.

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It is then urged that the signature of the appellant, even if not a material part, is still a part of the document placed before the Magistrate holding the enquiry under section 145 of the Criminal Procedure Code, and that the jury by their verdict have found that the signature was fraudulently made and made with the intention of causing it to be believed that it was made at a time at which the maker knew it was not made. It is thus contended that the making of a false document within the meaning of the first clause of section 464 has been established.

In deciding between these conflicting contentions, we must, I am of opinion, refer in the first place, to the definition of "document" contained in section 29 of the Indian Penal Code and in the two Explanations appended to that section.

The portion of the definition material for the purposes of this case runs as follows:—"The word 'document' denotes any matter expressed. . . . upon any substance by means of letters intended to be used or which may be used as evidence of that matter."

The first Explanation then says that it is immaterial whether the evidence is intended for, or may be used in, a Court of Justice or not, and the second Explanation provides that in determining what has in fact been expressed reference may be made to usage.

Section 30 of the Indian Penal Code then defines what documents are to be considered valuable securities, and it may be here observed that to forge a valuable security, or to dishonestly use as genuine a valuable security known to be forged are aggravated offences punishable under section 467 or section 471 read with section 467 of the Code; an alteration affecting the contract or altering the character of

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the instrument, other conditions being satisfied, would bring the offender within the scope of section 467.

But here we are not concerned, it seems to me, with the kabuliat as a valuable security or with the question whether the alteration made, invalidates the contract as between the parties thereto. We are concerned with the kabuliat as a document going to prove possession as against a third person, and for this purpose I am of opinion that the names of the attesting witnesses, that is, the apparent evidence of its genuineness, form a portion of the document as important as any other, and that this portion is a material part of the document within the meaning and for the purposes of the second clause of section 464 of the Indian Penal Code.

I am, therefore, of opinion that the contention of the appellant fails, that the first contention of the Crown is well-founded, and that the fraudulent addition of the name or signature of the appellant to those of the attesting witnesses constitutes the making of a false document within the meaning of the second clause of section 464.

With respect to the second contention of the Crown it is not disputed that, whether a material or immaterial part, the signature of the appellant, though no part of the document originally executed, was a part of the document presented to the Magistrate in the section 145 proceedings.

In order then to determine whether the conviction can be upheld with reference to the first clause of section 464, that is, to determine whether the signature was fraudulently made with the intention of causing it to be believed that it was made at an anterior date, we have next in my opinion to ascertain what facts have been found by the jury in arriving at their verdict of guilty, and for this purpose we must refer to the charge delivered by the learned Sessions Judge.

The portions of the charge material to the contentions before us are as follows:—

“The case for the prosecution is that a certain name was falsely inserted in the two documents among the names

of the witnesses to the execution of those documents. The question is whether that constitutes forgery. If the purpose was to deceive the Court into believing that the person whose name was inserted as an attesting witness was really an attesting witness, then the act was a fraudulent one, and the insertion of that name was an act done fraudulently. The jury may take it from me that such insertion would be the making of a false document, and if the object was to support a claim or title, or with intent that fraud may be committed, the act was forgery. As already remarked, if the insertion of the name was done with the object of deceiving the Court as to who were the attesting witnesses, then the act was done fraudulently, with intent to commit fraud or that fraud may be committed. If then the jury found that the name in question was subsequently inserted for the purpose of deceiving the Magistrate who was trying the case under section 145 of the Criminal Procedure Code into believing that that person was a witness present at the execution of the document and that he actually attested it, then the act of such insertion amounted to forgery. In dealing with the question as to what such insertion meant, the jury must first consider whether there was any such insertion."

The learned Sessions Judge then proceeded to invite the attention of the jury to the evidence, for instance (i) the evidence going to show that when produced the documents were intact, and that the portions now removed contained what purported to be the signature of the appellant, (ii) the certified copies obtained from the Registration Office, going to show that at the time of the registration the name of the appellant did not appear on either document, (iii) the general evidence given by the three prosecution witnesses one of whom, for instance, says that when the documents were produced in the course of the police investigation into the matter which led to the section 145 proceedings, they did not contain the signature of the appellant, and that the signature of the appellant found on the documents when produced before the Magistrate was

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in the appellant's own handwriting, and (iv) the statement of the appellant in which he says first that his name was not on the documents, next that he did not see the name, then in answer to a further question says that when the documents were produced by him they were intact, and next says that he does not recollect, and finally declines to make any further statement or offer any further explanation.

It cannot be said that the learned Sessions Judge's charge is particularly well arranged, but taking it as a whole, I am of opinion that in arriving at their verdict of guilty the jury must be held to have come to the following findings:—(i) That the name or signature of the appellant was in fact added or interpolated at some period subsequent to the registration of the documents, (ii) that the addition or interpolation was fraudulently made with the intention of deceiving the Magistrate into the erroneous belief that the appellant had in fact been present at the execution of the documents and had thereupon affixed his signature as an attesting witness, and (iii) that the addition or interpolation was made with the object of supporting a claim or title or with intent that fraud might be committed. On these findings I am of opinion that the fraudulent making of a part of a document (*i.e.*, the signature of the appellant) with the intention of causing it to be believed that such part was made at a long anterior date has been established.

But my learned brother is of opinion that the materials before the learned Sessions Judge did not justify him leaving it open to the jury to come to the second of the three findings set out above.

On this point the materials before the Judge were the matters to which, as I have indicated, he invited the jury's attention, and more particularly (i) the position of the signature alongside other signatures immediately below the word "*ishadi*," attesting witness—(ii) the evidence going to show that the addition was made after and not before the registration of the documents, and (iii) the appellant's denial that his signature ever appeared on either document.



With all deference to my learned brother I am of opinion that the materials indicated made it incumbent upon the Judge to leave to the jury the question now under consideration, and I am further of opinion that they justify the conclusion at which the jury have arrived.

Thus in my opinion the making of false documents within the meaning of the first clause of section 464 of the Penal Code, as well as within the meaning of the second clause, has been established.

As it has been further found that the false documents in question were made with the object of supporting a claim or title, or with intent that fraud should be committed, these false documents then become forged documents within the meaning of section 470 read with section 463 of the Code.

It has not been suggested before us that the further finding implied in the verdict of the jury, *viz.*, that the appellant fraudulently used the said forged documents knowing or having reason to believe them to be forged, can be successfully attacked. For these reasons I would affirm the conviction of, and the sentence passed on, the appellant.

Owing to this difference of opinion, the case was referred, under section 429 of the Criminal Procedure Code, to Mookerjee J.

*Babu Narendra Kumar Bose*, for the appellant.

*The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown.

MOOKERJEE J. The circumstances under which the appellant, Surendra Nath Ghose, has been convicted of an offence under section 471 of the Indian Penal Code, have been narrated in the opinions recorded by my learned brothers Harington and Teunon, and need not be recapitulated at full length. On the 4th August, 1909, the appellant deposed as a witness in a case under section 145 of the Criminal Procedure Code in which he himself was a party. He stated, *inter alia*, as follows:—"I am a witness to the kabuliats Exhibits I and II." Later on, in cross-examination he qualified the statement to

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some extent: "I was not a writing witness in any of the kabuliats." The kabuliats had been executed on the 15th March and 3rd April 1898, and had been registered on the 15th April of that year. Certified copies from the Registration Office were produced, and these established conclusively that the name of the appellant was not on the original documents as an attesting witness before their registration; in other words, that subsequent to the execution and registration of the documents, the name of the appellant was inserted in the list of attesting witnesses at the foot of each document. There is evidence to show that such insertion was made by the appellant himself. The position, therefore, is that the appellant placed his name on the documents as an attesting witness after their execution and registration. The theory of the prosecution is that he did this with the intention to have it believed that he had witnessed the execution of the documents. It is conceded that his name alone appeared on the documents, and that there was no date affixed thereto; on the other hand, there is no allegation that the appellant was actually present at the time of the execution of the documents. Upon these facts, the charge was brought against the appellant that he had dishonestly used as genuine documents (that is, the kabuliats) in which he had forged his name as an attesting witness. The Sessions Judge, on the basis of an unanimous verdict of a jury, has convicted the appellant under section 471 of the Indian Penal Code, and sentenced him to undergo rigorous imprisonment for two years. Upon appeal preferred to this Court, my learned brothers Harington and Teunon have differed in opinion as to the legality of this conviction. The matter has, therefore, been referred to me under section 429 of the Criminal Procedure Code.

On behalf of the appellant, the conviction has been assailed on the ground that the elements which must be proved before a conviction under section 471 can be made, have not been established. It has been contended that the case is covered by neither the first nor the second clause of section 464—not the first, because there is nothing to show that any

part of a document was dishonestly or fraudulently made by the appellant with the intention of causing it to be believed that such part was made at a time when he knew that it was not made; nor the second, because the appellant did not dishonestly or fraudulently alter a document in any material part thereof. These positions have been strenuously controverted on behalf of the Crown, and an attempt has been made to support the conviction as justified by both the first and second clauses of section 464.

In so far as the first clause of section 464 is concerned, to bring the case within its scope, it has to be proved that the act was done dishonestly or fraudulently. "Dishonestly" is defined in section 24, which provides that whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly." "Fraudulently" is defined in section 25 which provides that a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise. The question, therefore, arises whether, when the appellant inserted his name as an attesting witness in the kabuliats, he could be said to have done so dishonestly or fraudulently. In my opinion, he cannot be held to have done the act either dishonestly or fraudulently within the meaning of these words as defined in sections 24 and 25 of the Indian Penal Code. I am unable to appreciate how it can be seriously maintained that, when the appellant inserted his name as an attesting witness his intention was to cause wrongful gain to one person and wrongful loss to another person. The insertion of his name as an attesting witness may have increased the apparent evidence of the genuineness of the instrument. But the insertion of the name by itself could not have been intended to cause wrongful gain to one person or wrongful loss to another person. It seems to me further to be obvious that the insertion of the name of the appellant as an attesting witness, could not have been done with intent to defraud. The expression "intent to defraud" implies conduct coupled with intention to deceive and thereby to

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injure; in other words, "defraud" involves two conceptions, namely, deceit and injury to the person deceived, that is, infringement of some legal right possessed by him, but not necessarily deprivation of property. This would be so, whether we accept the restricted interpretation of "defraud" given by Mr. Justice Banerjee in *Queen-Empress v. Muhammad Saeed Khan* (1) and by Sir James Stephen in his *History of Criminal Law*, Vol. II, 121; Vol. III, 187, or adopt the wider interpretation laid down in *Queen-Empress v. Abbas Ali* (2), *Abdul Rajak v. Queen-Empress* (3), and *Reg. v. Toshack* (4). Now, the instruments in this case were admittedly genuine and operative in law. If therefore, when produced in a Court of Law they were found to be genuine, it could not possibly be maintained that any person would be defrauded thereby. Let us assume for a moment that an unwary Judge relied upon the statements of the appellant, treated him as an attesting witness, and on the faith of his allegation, found the instruments to be genuine, surely nobody would be defrauded thereby, whether we interpret the word "defraud" in its wider or narrower sense; the person against whom the kabuliats might be successfully used could not maintain the position that there had been any injury to him or infraction of his rights. In my opinion, it is clear that the appellant had no intent to defraud when he inserted his name as an attesting witness in the documents in question. In popular phraseology, perhaps, his conduct may be described as dishonest and fraudulent, but his act does not fall within the scope of the definitions given in sections 24 and 25 of the Indian Penal Code. The essence of the matter is that, although he might have intended that it should be believed that he was an attesting witness, he could not have thereby intended to cause wrongful gain to one person or wrongful loss to another person or to defraud any person by his act. I am further of opinion that the case does not fall within the first clause of section 464 of the Indian Penal Code, because there is

(1) (1898) I. L. R. 21 All. 113.

(3) (1895) P. R. Cr. 2.

(2) (1896) I. L. R. 25 Calc. 512.

(4) (1849) 4 Cox. C. C. 38.

nothing to justify the inference that the appellant intended it to be believed, that the document was made or his signature was put at a time when he knew it was not made or signed. His act is certainly consistent with the hypothesis that he intended it to be believed, that he would be able, if called as a witness, to prove the genuineness of the instruments, either because he had been present at the execution or had, at some occasion subsequent to the execution, received an acknowledgment from the executant as to the genuineness of his signature. In so far, therefore, as the contention on behalf of the Crown that the case falls within the first clause of section 464 is concerned, it must, in my opinion, be overruled.

In so far as the second contention on behalf of the Crown is concerned, it is, in my opinion, full of difficulties and is entirely unsustainable. It will be observed that in order to bring the case within the second clause, it has to be established, quite as much as in the case of the first clause, that the act was done dishonestly or fraudulently. Apart from this element, however, the question arises whether the appellant altered a document in any material part thereof when he affixed his name to it as an attesting witness. Now, it must be taken as settled beyond the possibility of dispute that the interpolation of the name of a witness in a document which need not be attested, is not a material alteration so as to render the document void. This proposition was enunciated by Mr. Justice Wilson in the case of *Mohesh Chunder Chatterjee v. Kamini Kumari Dabia* (1); there that learned Judge distinguished the case of *Suffel v. Bank of England* (2), where an alteration of the number of a Bank of England note so as to resemble another note of the same amount, was held to be an alteration of an essential part of the note. The alteration to be material must be one which alters or attempts to alter the character of the instrument itself, which affects or may affect, the contract which the instrument contains or of which it furnishes the evidence. This view has been followed in both Madras and Bombay: *Vazeer Ali v. Surya*

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(1) (1885) I. L. R. 12 Calc. 313.      (2) (1882) 9 Q. B. D. 555.

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*Narain* (1), and *Venkatesk Prabhu v. Baba Subraya* (2). In the latter case, Sir Charles Sargent C.J. with the concurrence of Mr. Justice Telang dissented from the contrary view adopted in the earlier decision in *Sitaram Krishna v. Daji Devaji* (3). The view that an alteration in a document stating a falsehood, either expressly or by implication, by way of increasing the apparent evidence of its genuineness is a material alteration, cannot be supported either upon the authorities or upon principle. The principle which lies at the root of the doctrine, as explained by this Court in the cases of *Gogun Chunder Ghose v. Dhuronidhur Mundul* (4), and *Gour Chandra Das v. Prasanna Kumar Chandra* (5), is two-fold, *first*, that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud, without running any risk of loss by the event, when it is detected; and, *secondly*, that by the alteration the identity of the instrument is destroyed, so that to hold one of the parties liable under such circumstances would be to make for him a contract to which he never agreed. It is manifest, that the principle upon which the rule is based cannot be extended to cases in which there is no attempt to commit a fraud nor is there an alteration of the identity of the instrument. The test, therefore, which has always been applied to determine the materiality of an alteration in an instrument is based upon solid grounds; that test is to see whether the addition gives a different legal character to the writing, and whether it completely changes the nature of the relation towards each other of the parties to it and their remedies upon it (Laws of England, Ed. Lord Halsbury, Vol. X, section 740). As has been well said, the test is, does the change in the instrument cause it to speak a different language in legal effect from that which it originally spoke? Has the change altered the legal identity or character of the instrument, either in its terms or in the relation of the parties to it? If

(1) (1891) 1 Mad. L. J. 388.

(3) (1883) I. L. R. 7 Bom. 418.

(2) (1890) I. L. R. 15 Bom. 44.

(4) (1881) I. L. R. 7 Calc. 616.

(5) (1906) I. L. R. 33 Calc. 812.



it has, the change is a material alteration and invalidates the instrument against all parties not consenting thereto. [See, for instance, *Homer v. Wallis* (1), *Brackett v. Montfort* (2) and *Milbery v. Stoker* (3), where the insertion of the name of an attesting witness to a bond after execution, was held to be a material alteration, because in those States different periods of limitation, are applicable to suits upon attested and unattested instruments.] Tested from this point of view, there is no room for controversy that the insertion of the name of the appellant as an attesting witness to the instruments in question does not constitute a material alteration. This view is also in accord with that generally adopted in the American Courts [*Fuller v. Green* (4)], though I am not unmindful that in isolated cases, it has been maintained that as attestation furnishes a distinct and different medium of proof of the execution of the instrument, the addition of the signature of an attesting witness to an unattested instrument, may be a material alteration: *Ellerson v. State* (5), *White v. Saxon* (6), *Marshall v. Gaugler* (7). It has been suggested, however, that the test to be applied to determine whether a document has been materially altered within the meaning of section 464, is different from the test to be applied to determine whether the alteration is material from the point of view of the rights of the contracting parties. In my opinion there is no difference in principle between the two classes of cases. What is the purpose for which a kabuliat is used? It is not direct evidence of possession; it merely furnishes the evidence of a contract of tenancy between two persons. In so far as it furnishes such evidence, it may tend to corroborate evidence of possession of the land to which it relates. In other words, if A asserts against X that he has been in occupation of the land, and produces a lease thereof from B, the lease, if believed,

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(1) (1814) 11 Mass 309;  
 6 Am. Dec. 169.

(2) (1833) 11 Maine 115.

(3) (1883) 75 Maine 69;  
 46 Am. Rep. 361.

(4) 1885) 64 Wis. 159: 24  
 N. W. 907; 54 Am. Rep. 600.

(5) (1881) 69 Ala. I.

(6) (1899) 121 Ala. 399;  
 25 South. 784.

(7) (1823) 10 Serg. & Raw. (Pa.) 164.

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may strengthen the oral evidence, because it furnishes a *prima facie* explanation of the alleged possession. It seems to me to be manifest that even if it be assumed that the addition of the name of the appellant to the kabuliats as an attesting witness has increased the apparent evidence of their genuineness, such insertion has not, in any sense of the term, altered the document in a material part thereof. In this view, the attempt of the Crown to bring the case within the second clause of section 464 of the Indian Penal Code cannot possibly succeed.

In so far as this second aspect of the case is concerned, I may add that it cannot be disputed that where the addition of an attesting witness has the effect of extending or altering liability under the document, for instance, where a document to be operative is required by law to be attested, and yet has not been attested, the procuring of a witness to sign as an attesting witness, after the execution of the instrument and without the consent of the maker, may be material and may constitute an alteration; but where, as here, subscribing witnesses have no influence upon the legal operation of the document, the addition does not change the legal effect of the instrument and is consequently immaterial. The precise question whether the addition of the name of an attesting witness to an instrument, which does not require by law to be attested, does or does not constitute forgery, has been raised, so far as I have been able to trace, in one case only. In *State v. Gherkin* (1), it was argued that the insertion in a bond, after the execution, of the name of a subscribing witness constituted forgery. This contention was overruled and it was held that putting a witness's name to a bond, not required to be attested by a subscribing witness, does not affect the validity of the bond and does not consequently constitute forgery. In fact in the "New Commentaries on the Criminal Law" by Bishop, (Vol. II, section 577), it is treated as settled law in the American Courts that the offence of forgery is not committed by the addition of the name of a subscribing witness to a bond not required by law to be witnessed,

(1) (1847) 7 Iredell N. C. 206.

because the alteration effected is not material, as it creates no falsity in the seeming legal efficacy of the writing: *Blackwell v. Lane* (1). The only case in the English Courts which has any bearing on the subject appears to be that of *Reg. v. Asplin* (2). There it was ruled, in a case under the Marriage Act, 24 and 25 Vict. Ch. 98, section 37, that the addition of a name as a witness, where witnesses are required, is not an immaterial alteration, although but two witnesses are required and there are two witnesses without the added name. That case, therefore, is clearly distinguishable. There was also the additional circumstance in that case that the witness knowing his own name to be Asplin signed another name Richardson without authority, and it was held that though there might not have been any intent to defraud, he was guilty under these circumstances.

On these grounds, I agree with my learned brother Harington that the Sessions Judge in this case ought to have directed the jury to return a verdict of acquittal, and that the conviction of the appellant has been brought about by a misdirection of the jury.

The appeal is, therefore, allowed, the conviction and sentence set aside, and the prisoner acquitted. If he is still in custody he must be released forthwith. If he is on bail, he will be discharged from his bail.

E. H. M.

*Appeal allowed.*

- (1) (1838) 4 Dev. & Bat. 113; (2) (1873) 12 Cox C. C. 391.  
32 Am. Dec. 675.

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## CRIMINAL REFERENCE.

*Before Mr. Justice Holmwood and Mr. Justice Doss.*

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 Sept. 8.

EMPEROR

v.

CHATURBHUI SAHU.*

Accomplice—Spy or detective associating with a wrong-doer for the purpose of discovery and disclosure of an offence—Necessity of Corroboration—Evidence Act (1 of 1872) ss. 114, 133.

A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either before associating with wrong-doers or before the actual perpetration of the offence, is not an accomplice but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.

Rex v. Despard (1), *Reg. v. Dowling* (2), *Reg. v. Mullins* (3), *Rex v. Bickley* (4), *Reg. v. Shankar Shobag* (5) approved of.

Queen-Empress v. Javecharam (6) distinguished by Holmwood J. and dissented from by Doss J.

Grimm v. United States (7), *State v. McKean* (8), *State v. Brownlee* (9), *Wright v. State* (10), *People v. Bolanger* (11), *People v. Farrel* (12), *Commonwealth v. Downing* (13), *Commonwealth v. Baker* (14), *State v. Baden* (15), *People v. Noelke* (16), *Campbell v. Commonwealth* (17),

* Criminal reference No. 175 of 1910 against the order of J. C. Twidale, Sessions Judge of Bhagalpore, dated July 19, 1910.

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| (1) (1803) 28 How. St. Tr. 346, 489. | (10) (1880) 7 Tex. Ct. App. 574: |
| (2) (1848) 3 Cox. C. C. 509. | 32 Am. Rep. 599. |
| (3) (1848) 3 Cox. C. C. 526. | (11) (1886) 71 Cal. 17: |
| (4) (1909) 2 Cr. App. Rep. 53; | 11 Pac. 799. |
| 73 J. P. 239. | (12) (1866) 30 Cal. 316. |
| (5) (1888) Ratan. Unrep. Cr. Ca. 428. | (13) (1855) 4 Gray 29. |
| (6) (1894) I. L. R. 19 Bom. 363. | (14) (1891) 155 Mass. 289: |
| (7) (1894) 156 U. S. 604. | 29 N. E. 512. |
| (8) (1873) 36 Iowa 343: | (15) (1887) 37 Minn. 212: |
| 14 Am. Rep. 530. | 34 N. W. 24. |
| (9) (1892) 84 Iowa. 783: | (16) (1883) 94 N. Y. 137: |
| 51 N. W. 25. | (17) (1877) 84 Penn. 187. |

O'Grady v. People (1), *Andrews v. United States* (2), *Shepard v. United States* (3), and *Connor v. People* (4) referred to by Doss J.

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THE facts of the case are as follows. The Excise Deputy Collector of Bhagalpore deputed one Bibhuti Bhusan Fouzdar, in April last, to purchase cocaine from the petitioner, as a spy or detective, the money necessary for the purpose being supplied by the Excise Sub-Inspector. Bibhuti accordingly bought a phial of cocaine on the 5th April, alleged to have been sold to him by the petitioner, and two more the next day which he made over to the Excise Deputy Collector. The petitioner was put on his trial before Babu Surendra Nath Mozumdar, Deputy Magistrate of Bhagalpore, under s. 46 of the Bengal Excise Act (V of 1909), charged with the illicit sale of cocaine on the 6th April. The only witnesses examined in the case were the Excise Deputy Collector, the Excise Sub-Inspector, Bibhuti and one Kanai Ram Marwari. The evidence of the first three witnesses is summarized in the judgment of the High Court. Kanai stated that Bibhuti did not purchase the cocaine from the present petitioner but from another. The Magistrate convicted the petitioner and sentenced him to a fine of Rs. 200. The Sessions Judge of Bhagalpore reported the case to the High Court under s. 438 of the Criminal Procedure Code, and recommended the reversal of the conviction and sentence on the ground that Bibhuti was an instigator of the offence alleged and, therefore, an accomplice, and not a mere spy or detective, and that his evidence was without corroboration regarding the purchase of cocaine from the petitioner.

Mr. Hug (with him *Babu Sailendra Nath Palit*), for the petitioner.

Babu Sirish Chandra Chowdhury, for the Crown.

HOLMWOOD J. I need only say that I entirely concur in the findings which my learned brother is about to deliver as

(1) (1908) 42 Col. 512:
95 Pac. 346.

(2) (1895) 162 U. S. 420.
(3) (1908) 164 Fed. 584.

(4) (1893) 36 Am. St. R. 308.

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the judgment of the Court, but I desire to dissociate myself from any reliance on American rulings which are of no authority in this country and in my opinion have no value. except in so far as they depend on the prior decisions of English Judges which are in themselves sufficient authority for the view we have taken. I may also point out that in the case of *Queen-Empress v. Javecharam* (1) the Judges cited with approval the English cases upon which we have relied in this case; and, in my opinion, it would be very easy to distinguish that ruling from the present case on the facts, and it, therefore, would not be necessary to dissent from it, although I agree with my learned brother that it is opposed to the recent ruling in *Rex v. Bickley* (2).

With regard to the order on a similar unreported reference in Chambers, which has been referred to before us, I would point out that the matter was not argued before the learned Judges, and the order is merely "that for the reasons given by the Sessions Judge the conviction and sentence are set aside." Those reasons having, upon an examination of all the authorities and on a full discussion of the question by learned counsel, turned out to be unfounded, I do not think it necessary to regard this order as a ruling of the Court on a point of law.

Doss J. This is a Reference by the Sessions Judge of Bhagalpore, under section 438 of the Criminal Procedure Code, recommending that the conviction and sentence on the petitioner be set aside on the ground that it is based on the uncorroborated testimony of an accomplice.

The narrative of facts is short and simple. The Excise Deputy Collector of Bhagalpore deputed one Bibhuti Bhusan Fouzdar, a student of Tej Narain Jubilee College, to purchase cocaine from Chaturbhuj Sahu, the petitioner. Bibhuti Bhusan purchased a phial of cocaine on the 5th April, and two phials on the 6th April, with money supplied by the Excise Sub-Inspector, and handed them over to the Deputy Collector

(1) (1894) I. L. R. 19 Bom. 363. (2) (1909) 2 Cr. App. Rep. 53:
 73 J. P. 239.

on the 6th. The petitioner was tried for the illicit sale of cocaine under the summary procedure by the Deputy Magistrate of Bhagalpore. Bibhuti Bhusan in his evidence deposed to the purchase of cocaine from the accused under instructions from the Excise Deputy Collector, who stated that he gave such instructions, and received the three phials of cocaine from him. The Excise Sub-Inspector stated that he gave money to Bibhuti Bhusan in order to purchase the cocaine. The petitioner has been convicted under section 46 of Act V of 1909, and has been sentenced to a fine of Rs. 200.

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On these facts the learned Sessions Judge is of opinion that Bibhuti Bhusan must be deemed to have acted as an instigator of the offence committed, and that he cannot therefore, according to the decision of the Bombay High Court in *Queen-Empress v. Javecharam* (1) be considered in the light of a mere spy or a detective, but is one who falls within the category of an accomplice, whose evidence, according to the ordinary rule, cannot be believed without corroboration. The question raised is of considerable importance and of not infrequent occurrence in practice. We have, therefore, felt it our duty to examine at some length the authorities bearing on the subject with a view to ascertain the essential ingredient which differentiates a spy or a detective from an accomplice.

In *Rea v. Despard* (2), where the accused was tried for high treason, Lord Ellenborough in his summing up to the jury said "But there is another class of persons which cannot properly be considered as coming within the description or as partaking of the criminal contamination of an accomplice; I mean persons entering into communication with the conspirators with an original purpose of discovering their secret designs and disclosing them for the benefit of the public. The existence of such original purpose on their part is best evinced by a conduct which precludes them from ever wavering in or swerving from the discharge of their duty, if they might otherwise be disposed so to do."

(1) (1894) I. L. R. 19 Bom. 363. (2) (1803) 28 How. St. Tr. 346, 489.

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In *Reg. v. Dowling* (1), in which the accused was tried on a charge of treasonable conspiracy, the Central Criminal Court held that a person who enters into a conspiracy for the sole purpose of detecting and betraying it does not require confirmation as an accomplice, although his evidence should be received by the jury with caution. In his summing up to the jury, Erle J., advertent to the particular witness, said that, "although he had been designated as a spy or a traitor, and an accomplice, if his object in entering into the confederacy was not to deceive or entrap any one, but to serve his country, he was entitled to praise instead of censure. If he only lent himself to the scheme for the purpose of convicting the guilty, he was a good witness, and his testimony did not require confirmation as that of an accomplice would do: he was not an accomplice, for he did not enter the conspiracy with the mind of a co-conspirator, but with the intention of betraying it to the police, with whom he was in communication."

In *Reg. v. Mullins* (2), the Central Criminal Court held that a person employed by Government to mix with conspirators and pretend to aid their designs for the purpose of betraying them does not require corroboration as an accomplice. Maule J., in his direction to the jury, distinguished between two classes of witnesses. As to one class he said, "they were persons who understanding, as they say, that there were dangerous designs entertained by certain Chartist societies, joined the meetings, and pretended to sympathise with the views of the conspirators, in order that they might communicate their designs to Government. They joined the scheme for the purpose of defeating it, and may be called spies." As to the other class he said "on the other hand, they were really Chartists, concurring fully in the criminal designs of the rest for a certain time, until getting alarmed, or from some other cause, they turned upon their former associates, and gave information against them. These persons may be truly called accomplices. Now as to spies, I know

(1) (1848) 3 Cox. C. C. 526.

(2) (1848) 3 Cox. C. C. 509.

of no rule of law which declares that their evidence requires confirmation, nor any rule of practice which says that juries ought not to believe them." Later on, the learned Judge thus stated the reason for this distinction. "An accomplice confesses himself a criminal, and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man, he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The Government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators."

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This case has been recently followed by the Court of Criminal Appeal (Lord Alverstone L. C. J. and Bigham and Walton JJ.) in *Rex v. Bickley* (1), where the prisoner was convicted under 24 and 25 Vict. c. 100, s. 59 of having unlawfully supplied a noxious thing to a woman with intent to procure her miscarriage. The woman, who was not pregnant, acted under police instructions in order to trap the prisoner. It was contended on appeal that there was misdirection as no warning had been given to the jury that they should regard the evidence of the woman to whom the drugs had been supplied as that of an accomplice. The Court held that "the fact that the woman was a police spy in no way invalidated her evidence, nor must her evidence be regarded as that of an accomplice." And proceeded to affirm that "as the law stands at present, it seems established that a police spy does not need corroboration."

In *Reg. v. Shankar Shobag* (2) Birdwood and Jardine JJ., following the rule stated in section 971 of Taylor on Evidence, which is based on the summing up of Lord Ellenborough in *Rex v. Despard* (3), held that persons who have entered into

(1) (1909) 2 Cr. App. Rep. 53: 73 J. P. 239. (2) (1888) Ratan Unrep. Cr. Ca. 428.
(3) (1803) 28 How. St. Tr. 346, 489.

(3) (1803) 28 How. St. Tr. 346, 489.

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communication with conspirators, but who in consequence of either a subsequent repentance or an original determination to frustrate the enterprise, have disclosed the conspiracy to the police authorities under whose direction they continue to act with their guilty confederates till the matter can be so far matured as to ensure their conviction, belong to the class of persons apparently accomplices to whom the rule requiring corroborative evidence does not apply, and that the early disclosure is considered as binding the party to his duty, and though a great degree of disfavour may attach to him for the part he has acted as an informer, yet his case is not treated as that of an accomplice.

In *Queen-Empress v. Javecharam* (1) Jardine and Ranade JJ. held with dubiety that the action of the spy and informer in the case, in suggesting to the prisoner, at the instance of the police, to sell some used tickets and his offering to buy some of them, amounted to a criminal offence and that, as the first instigator of the offence, he should be regarded as an accomplice whose evidence could not be believed without corroboration. In their judgment the learned Judges thus observed "Mohamed Ali appears from his own account to have been the first instigator of the present offence; not merely a spy, who knowing of criminal doings, or doings which will culminate in a crime, merely pretends to concur with the perpetrators. Mere good intention does not ordinarily excuse a criminal act." With every respect to the learned Judges we are unable to follow this decision, which is opposed to the recent ruling by the Court of Criminal Appeal in the case of *Rex v. Bickley* (2) where the woman who asked the prisoner to supply her with a noxious drug to cause her miscarriage, and who in doing so acted under police instructions, was clearly the first instigator, and yet the Court held that that circumstance did not deprive her of the character of a spy.

The object of the instigation in all these cases is not the perpetration of the offence, but the detection of it; not the transgression of law, but the securing of evidence for the

(1) (1894) I. L. R. 19 Bom. 363. (2) (1909) 2 Cr. App. Rep. 53.

enforcement of public justice. It may be argued that the State should not punish as an offence against itself an act which was instigated by its own official, a position which was vigorously, though unsuccessfully, maintained before the Supreme Court of the United States by the counsel for the appellant in *Grimm v. United States* (1). It may be urged with equal force that if the act is an offence, mere good intention on the part of the instigator does not render him less a participant in the crime and hence falling within the ambit of the rule requiring corroboration. But logical conclusions, however attractive, must yield to the over-riding necessities of legal policy. The correct solution of the matter in our opinion seems to be this:—Spies or decoys are generally employed for the purpose of ferreting out habitual offenders in certain classes of offences. In such case, the punishment is indeed aimed not so much against the offence committed in consequence of such instigation as against the series of similar offences which the offender is believed to have been in the habit of committing before the last offence and which, but for recourse to such stratagem, would have remained undetected for an indefinite period. In respect of such previous offence the spy or informer is *ex hypothesi* not an accomplice. It is not difficult to conceive a large variety of cases in the field of criminal law where the detection of the offence cannot be successfully effected except by the employment of such artifice; to exclude evidence so obtained for mere lack of corroboration, however unimpeachable such evidence may be in any particular case, would not unoften lead to the disastrous result of placing the transgressors of law beyond the reach of public justice.

The rule laid down in *Rex v. Despard* (2) has been followed in a long and uniform current of decisions in America where it has been held that one who as a spy or a detective associates with criminals solely for the purpose of discovering and making known their crimes, and who acts throughout with this purpose, and without any criminal intent, is not an accomplice, and it is immaterial that he encourages or aids

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(1) (1894) 156 U. S. 604. (2) (1803) 28 How. St. Tr. 346, 489.

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in the commission of the crime. See *State v. McKean* (1), *State v. Brownlee* (2), *Wright v. State* (3), *People v. Bolanger* (4), *People v. Farrel* (5), *Commonwealth v. Downing* (6), *Commonwealth v. Baker* (7), *State v. Baden* (8), *People v. Noelke* (9), *Campbell v. Commonwealth* (10), *O'Grady v. People* (11) (where several other cases on the point are collected), and *Grimm v. United States* (12).

In the recent case of *Shepard v. United States* (13), where the accused being suspected of being engaged in employing the mails for the dissemination of vicious and immoral literature in breach of the post-office laws which prohibited the use of the mails for such a purpose, an agent of the post office department, acting as a Government detective, wrote decoy letters to the accused which induced the latter to send such objectionable matter in return through the post: it was held that the writing of the decoy letter did not make the detective a party to the offence so as to render his testimony subject to the rule relating to accomplices.

The case of *Connor v. People* (14) cited by the learned counsel for the appellant in the case of *Rea v. Bickley* (15) has, as pointed out in the judgment of the Court, no bearing upon the present question. Moreover, it is opposed to the ruling of the Supreme Court of the United States in the cases of *Grimm v. United States* (12), and *Andrews v. United States* (16).

But though the testimony of a spy does not stand in need of corroboration in order to be acted upon, it is entirely for the Judge of fact to decide in each particular case what

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| (1) (1873) 36 Iowa. 343:
14 Am. Rep. 530. | (8) (1887) 37 Minn. 212:
34 N. W. 24. |
| (2) (1892) 84 Iowa. 473:
51 N. W. 25. | (9) (1883) 94 N. Y. 137: |
| (3) (1880) 7 Tex. Ct. App. 574:
32 Am. Rep. 599. | (10) (1877) 84 Penn. 187. |
| (4) (1886) 71 Cal. 17: 11 Pac. 799. | (11) (1908) 42 Col. 312:
95 Pac. 346. |
| (5) (1886) 30 Cal. 316. | (12) (1894) 156 U. S. 604. |
| (6) (1855) 4 Gray 29. | (13) (1908) 164 Fed. 584. |
| (7) (1891) 155 Mass. 289:
29 N. E. 512. | (14) (1893) 36 Am. St. Rep. 300. |
| | (15) (1909) 2 Cr. App. Rep. 53:
73 J. P. 239. |

(16) (1895) 162 U. S. 420.

weight he will attach to this kind of evidence, the question depending upon the character of each individual witness.

It may sometimes be difficult to draw the line of discrimination between an accomplice and a pretended confederate, such as a detective, spy or decoy; but we think, that the line may be drawn in this way:—If the witness has made himself an agent for the prosecution, before associating with the wrong-doers or before the actual perpetration of the offence, he is not an accomplice; but he may be an accomplice if he extends no aid to the prosecution until after the offence has been committed.

With regard to the order on a similar reference in Chambers, which has been referred to before us, it is sufficient to say that in the face of the authorities which we have already discussed we are unable to accept the opinion implied in the order as sound.

For these reasons, we are unable to accept the recommendation of the learned Sessions Judge to set aside the conviction and sentence.

Conviction upheld.

E. H. M.

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CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Teunon.

1910

July 14.

SHASHI BHUSHAN SEAL

v.

EMPEROR.*

Criminal proceedings, stay of—Pendency of civil suit—Letter alleged to be forged set up as a defence—Genuineness of letter a principal issue in the case—Subsequent institution of criminal proceedings for forgery in respect of the same.

Where after the institution of a civil suit on a promissory note the defendant was called upon to furnish security, and set up, as an answer, to the plaintiffs' claim, a letter which was alleged to bear a forged signature and in respect of which criminal proceedings under ss. 465 and 467 of the Penal Code were taken by one of the plaintiffs:—

Held, that inasmuch as the letter was a necessary part of the defendant's case and the question of its genuineness a principal issue in the suit, the criminal proceedings ought to be stayed pending the decision in the civil suit.

ON 7th February, 1910, Debendra Nath Nandi and his two brothers, including Manik Lal Nandi, filed a suit in the Original Side of the High Court, being suit No. 123 of 1910, against the petitioner, Shashi Bhushan Seal, for the recovery of Rs. 8,000 and interest due on a promissory note executed by the petitioner originally in favor of the mother of the plaintiffs on the 29th May, 1903, but renewed from time to time till the 30th June, 1909, when a fresh note was executed by him in the names of the plaintiffs personally. The latter also obtained a Rule on him to show cause why he should not furnish security to satisfy any future decree, or, in default, why his properties should not be attached. In showing cause, the petitioner filed an affidavit in which he referred to a letter of the 30th June, alleged to have been signed by the plaintiffs, according to the terms of which the amount of the note was not to have been returned in cash, but to have been appropriated to the purchase and obtaining possession of certain

* Criminal Revision, No. 799 of 1910, against the order of D. Swinhoe, Officiating Chief Presidency Magistrate, dated June 8, 1910.

properties in which the plaintiffs were to be allotted certain shares on payment of a moiety of the costs of getting possession of them. In reply the plaintiffs filed a counter affidavit alleging that the letter was signed only by two of them, Manik Lal being then absent from Calcutta, and that it had been obtained by false representations on the part of the petitioner, in consequence of the discovery of which Manik Lal had not subsequently signed it. The letter was not filed with the affidavit, but was alleged to have been produced in Court before Chitty, J., during the hearing of the Rule, through the petitioner's counsel. The Rule was discharged on the 21st February; whereupon Manik Lal filed a complaint, on the 2nd March, before the Chief Presidency Magistrate against the petitioner, charging him, under ss. 465 and 467 of the Penal Code, with the forgery of his name on the letter. The Magistrate directed the attendance of witnesses on the 18th, and issued a notice on the accused to produce the letter. In the meantime, on the 15th March, the petitioner filed his written statement in the High Court in the civil suit. On the 18th the case was made over for inquiry and report to an Honorary Magistrate. On the 7th June, Mr. J. Ghosal, an Honorary Magistrate, held an inquiry, and recommended proceedings against the petitioner under the sections above named, and the Chief Presidency Magistrate accordingly issued a summons on him the next day. The petitioner then moved the High Court and obtained the present Rule to stay the criminal trial during the pendency of the civil suit.

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Mr. Monnier (with him *Babu Atul Krishna Roy*) shewing cause. It has very recently been held that it would be a dangerous doctrine to lay down any hard-and-fast rule that a criminal trial should necessarily be stayed pending a civil suit between the same parties and involving the same or some of the matters in issue: *Brojobashi Panda v. Emperor* (1). The mere fact of pendency of civil litigation in respect of the same subject-matter is not a sufficient reason for staying a

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criminal trial, but some particular ground must be shown: *Dwarka Nath Rai Chowdhury v. Emperor* (1) followed in *Charu Chandra Bannerjee v. King-Emperor* (2). The same view was taken in *In re Devji* (3). There are no special reasons in this case. The fact of the civil suit being prior in time is not a good ground, as the discovery of the forgery was subsequent to its institution. The issues are not necessarily the same on the civil and criminal proceedings. The plaintiffs allege that the letter was due to false representations on the part of the petitioner. This would be an issue, and it is only in the event of its being decided against the plaintiffs that the question of forgery would arise: otherwise not. Then the decision in the civil suit would not be binding on the Magistrate: see s. 43 of the Evidence Act, and *Raj Kumari Debi v. Bama Sundari Debi*, per Rampini J. (4), *In re Bal Gangadhar Tilak* (5). At all events the Magistrate has jurisdiction to stay proceedings, and the High Court should ordinarily leave the matter to his discretion, as was actually done in *Rajkumari Debi v. Bama Sundari Debi* (4) and in *In re Shri Nana Maharaj* (6).

Babu Manmatha Nath Mukerjee, for the petitioner, was not called upon.

HARINGTON AND TEUNON, JJ. This is a Rule calling upon the Chief Presidency Magistrate to show cause why the prosecution in this petition complained of should not be stayed, on the ground that the genuineness of the document, which is the subject of the prosecution, is a question at issue in a civil suit, and, therefore, criminal proceedings ought not to be taken in respect of it until the determination of this civil suit.

What has happened is this. The prosecutor in the criminal case sued the defendant on a promissory note. In the course of the proceeding an affidavit was filed by the defendant, which disclosed a letter on which the defendant relied as showing that there was special arrangement with regard to the promissory note which would be an answer to the suit brought

- (1) (1904) I. L. R. 31 Calc. 858. (4) (1896) I. L. R. 23 Calc. 610.
 (2) (1905) 9 C. W. N. cclxii. (5) (1902) I.L.R. 26 Bom. 785, 791.
 (3) (1893) I. L. R. 18 Bom. 581. (6) (1892) I. L. R. 16 Bom. 729.

against him on that note by the prosecutor. The prosecutor says that the letter is a forgery. He at once took proceedings against the defendant in the Criminal Court for forgery.

On the hearing of this Rule, he strongly resisted the application that the criminal prosecution should be stayed until the civil suit is decided.

Now, it is perfectly true, as he says, that the fact standing alone that there is a civil suit would not in all cases be a sound reason for staying the criminal proceeding. But in this particular case the letter has been disclosed in the course of a civil proceeding, and is relied on by the defendant as his answer to the plaintiff's claim, and for the purpose of establishing his answer that letter is a necessary part of his case. And the question whether the letter is a genuine document or not, it appears to us, will be a principal issue in the suit brought against him by the prosecutor. Under the circumstances we think that the criminal proceedings ought to be stayed.

In this particular case there is even more reason for staying proceedings than there is in ordinary cases, because the civil suit has been brought by the same person who has instituted the criminal proceeding. The civil suit was brought by him first in point of time, and it lies in his hand to expedite the hearing of it.

The argument, therefore, which is often used that the criminal proceedings ought not to be allowed to hang indefinitely does not arise in this case, because it rests in the hand of the prosecutor to have the civil suit determined without delay, and then to take such criminal proceedings as he thinks proper.

Inasmuch as there is a serious allegation with reference to the letter, we do not think it right to allow that letter to go out of the Court's control. We direct that the letter be impounded and the criminal proceeding be stayed pending the hearing of the civil suit. The Rule, therefore, is made absolute.

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Rule absolute.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and
Mr. Justice Woodroffe.*

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July 19.

BRITISH AMERICAN TOBACCO CO., LD.

v.

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Trade-mark—Trade name—Assignment—Goodwill—Infringement.

Where a cigarette manufacturer, carrying on only one business and being the proprietor of several trade-marks which he used indiscriminately, purported to assign to another cigarette manufacturer "all that the trade-mark, name and label known as the 'Sri Durga' trade-mark, used upon packets of cigarettes sold and known as 'Sri Durga' cigarettes and the goodwill of his business so far as the same relates thereto," and continued dealing in his cigarettes under the other marks:—

Held, that the assignment was void and inoperative.

For the assignment of a trade-mark to be operative in law, it is not sufficient that an assignment of goodwill should accompany or follow the transfer of the trade-mark, so as literally to comply with the rule that a trade-mark cannot be transferred in gross, but the trade-mark must continue to be a representation of the truth, as warranting the origin of the goods to which it is attached, within the limits of deviation sanctioned by the usage of trade and commerce.

Leather Cloth Company v. American Leather Cloth Company (1), *Hall v. Barrows* (2), *Singer Manufacturing Company v. Wilson* (3), *Singer Manufacturing Company v. Loog* (4), *Pinto v. Bailman* (5) and *Edwards v. Dennis* (6) referred to.

APPEAL by the plaintiff Company from the judgment of Fletcher J.

This appeal arose out of a suit brought by the British American Tobacco Company (India), Ltd., to restrain the defendants, Sheikh Mahboob Buksh and Mahomed Ismail, from infringing a trade-mark which the plaintiff Company claimed as their exclusive property and for consequential relief and damages.

* Appeal from Original Civil, No. 44 of 1909, in Suit No. 956 of 1903.

(1) (1865) 11 H. L. 523.

(4) (1882) L. R. 8 A. C. 15.

(2) (1863) 4 DeG. J. & S. 150.

(5) (1891) 8 R. P. C. 181.

(3) (1876) L. R. 2 Ch. D. 434.

(6) (1885) L. R. 30 Ch. D. 454.

The material facts as found established in evidence were shortly as follows:—

In the year 1908 one Kusi Lal Kabasi was carrying on business in Calcutta as a manufacturer of cigarettes under the name of the Hindustan Cigarette Company. The business was not in a flourishing condition. It was suggested to Kabasi that he should adopt representations of Hindu deities as marks for certain brands of cigarettes, and he determined to put “god” and “goddess” brands of cigarettes on the market. Being in need of financial assistance in placing the new brands on the market, Kabasi approached Mahomed Ismail, a member of the defendants’ firm, with a view to his joining as a partner, but, before anything was arranged, the latter left for Delhi.

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On the 28th July, 1908, Kabasi placed a new brand of cigarette on the market, distinguished by the device of the Hindu deity “Sri Durga” with its shrine painted on a label of greyish blue with the words “Sri Durga” on the top of the device.

Ismail had become aware of the intended user of this trade-mark during the negotiations for partnership which had taken place between him and Kabasi, and on the 29th July, 1908, Ismail’s manager made a declaration, before a Presidency Magistrate, of Ismail’s intention to use a picture of “Sri Durga” as his trade-mark.

During the month of August the cigarettes put on the market by Kabasi and bearing the “Sri Durga” trade-mark became well known in the market as cigarettes manufactured by Kabasi and acquired a considerable reputation. Kabasi’s financial position did not, however, improve, and towards the end of August negotiations commenced between the plaintiff Company and Kabasi with a view to the acquisition by the Company of Kabasi’s “Sri Durga” mark.

At the time Kabasi was entitled to four trade-marks in connection with cigarettes consisting of picture representations of the Hindu gods, Gopal, Jugal, Jagat-dhatti and Durga, and he used to use these four marks indiscriminately in the one business which he was carrying on. The several

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marks in no way indicated the use of a different tobacco or any difference in manufacture, nor was there a separate business in respect of the cigarettes sold under the several brands.

The consumption of cigarettes in India had enormously increased during recent years, and the plaintiff Company, deeming it advisable to acquire some Indian marks, entered into an arrangement with Kabasi, which was carried into effect by an Indenture dated the 2nd September, 1908. By this Indenture Kabasi, in consideration of the sum of Rs. 2,000, assigned to the Company "all that the trade-mark, name, and label known as the 'Sri Durga' trade-mark, name, and label and used upon packets of cigarettes sold and known as 'Sri Durga' cigarettes and the goodwill of his said business (*viz.*, the Hindustan Cigarette Company), so far as the same relates thereto, to hold the same unto the Company absolutely." There followed the usual covenants.

Subsequent to this assignment, Kabasi continued selling his cigarettes under the mark of the god "Gopal."

On the 19th September, 1908, the plaintiff Company for the first time put their cigarettes on the market under the mark of "Sri Durga." At first they sold the cigarettes in packets supplied by Kabasi, bearing the name of the Hindustan Cigarette Company, but subsequently they dropped the words "Hindustan Cigarette Company," when exactly it did not appear. Since then the plaintiff Company's "Sri Durga" cigarettes were sold in the market, without the name of the manufacturer on them.

Early in October, 1908, the defendants put upon the market cigarettes of their manufacture with a representation of "Sri Durga" on the packets. The plaintiff Company immediately took proceedings against the defendants in the Presidency Magistrate's Court, but the Magistrate came to the conclusion that the case was one for a Civil Court, and refused to make any order against the defendants.

On the 5th November, 1908, the plaintiff Company brought this action, alleging that since the 2nd September, 1908, they had extensively used the trade-mark "Sri Durga," and that "Sri Durga" cigarettes came to mean in the trade

cigarettes made and sold by them; that the defendants by the use of their device which was identical with that of the plaintiff Company, and of the words "Sri Durga," had infringed the plaintiff Company's trade-mark, and had sold and passed off large quantities of cigarettes not of the plaintiff Company's manufacture as and for the plaintiff Company's cigarettes. The plaintiff Company claimed a double title of the trade-mark: first, a derivative title from Kabasi; and, secondly, an independent title in themselves.

The pleas taken in defence were that the defendants were the inventors of the trade-name "Sri Durga" as applied to cigarettes and were the exclusive owners of it, that the user by Kabasi was an infringement of their trade-mark, which had been registered on the 29th July, 1908, that the plaintiff Company acquired no title to the trade-mark by the Indenture of the 2nd September, 1908, and that the defendants' cigarettes bearing the trade-mark were in the market previous to those of the plaintiff Company.

The suit came on for hearing before Fletcher J., who on the 15th July, 1909, dismissed the suit with costs holding "that the plaintiff Company did not in law acquire from Kabasi the exclusive right of using this trade-mark, and further that since that date they have not acquired any new exclusive right to the user of the word." After discussing the evidence his Lordship observed:—

"Now, the principles governing the law relating to trade-marks, where there is no statute establishing the registration of trade-marks and no authority exists from which the exclusive right to a particular trade-mark can be obtained, have been laid down by the Privy Council in the case of *Somerville v. Schembri* (1), which was on appeal from the Court of Appeal for Malta, thus:—

"In Malta there is no law or statute establishing the registration of trade-marks and no authority exists from whom an exclusive right to a particular trade-mark can be obtained. The rights of the parties to this cause are therefore dependent upon the general principles of the Commercial Law, some of which are referred to in the Court of Commerce. These principles have been very fully illustrated and explained by the House of Lords in the *Leather Cloth Company v. American Leather Cloth Company* (2), *Wotherspoon v. Currie* (3), *Johnston &*

(1) (1887) L. R. 12 A. C., 453, 456. (2) (1865) 11 H. L. 523, 538.

(3) (1872) L. R. 5 A. C. 508.

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Co v. Orr Ewing & Co. (1); all of which were cases which arose before the passing of the first British Trades-mark Registration Act in the year 1875.

In the first of these cases the interest which a merchant or manufacturer has in the trade-mark which he uses was thus defined by Lord Cranworth. "The right which a manufacturer has in his trade-mark is the exclusive right to use it for the purpose of indicating where or by whom or at what manufactory the article to which it is affixed was manufactured. As soon therefore as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the exclusive property of the firm, and no one else has a right to copy it, or even to appropriate any part of it, if by such appropriation unwary purchasers may be induced to believe that they are getting goods which were made by the firm, to whom the trade-mark belongs."

The authorities also show that no particular length of user is necessary in order to confer this right upon the person using the trade-mark. All that it is necessary is, that the mark should have become identified with the goods of the person claiming it. If Kabasi had remained the owner of this mark and continued his business, I should on the evidence have held that he was entitled to restrain the defendants from using it. But this suit is brought by the plaintiff Company claiming through the assignment of the 2nd September, 1908. What Kabasi assigned to the plaintiff is not open to doubt. Kabasi himself says he sold the "Brand." It is not said by the plaintiff Company that they acquired either the manufactory or business of Kabasi. In these circumstances it becomes necessary to enquire whether by this assignment in gross Kabasi could pass to the plaintiff Company the exclusive right to use the trade-mark purported to be assigned.

Now in *The Leather Cloth Case* (2), Lord Cranworth said: "The right to a trade-mark may in general treating it as property, or as an accessory to property, be sold or transferred upon a sale and transfer of the manufactory of the goods on which the mark has been used to be affixed, and may be lawfully used by the purchaser."

Again, in a more recent case of *Pinto v. Badman* (3), Fry, L. J., stated the rule in the following terms:—"It may be assigned if it is indicative of its origin when the origin is assigned with it. It cannot be assigned when it is divorced from its place of origin or when in the hands of the transferee it would indicate something different to what it indicated in the hands of the transferor;" and it is to be noticed that the actual decision in *Pinto v. Badman* (3) was that the right to the use of a brand for cigars without the factory and business of the manufacturer who first acquired it cannot be sold. That case is not distinguishable from the present.

(1) (1882) L. R. 7 A. C. 219. (2) [1901] A. C. 217.

(3) (1891) 8 R. P. C. 181.

But Counsel has argued that, even if that be so, the assignment can be viewed as an abandonment by Kabasi of his trade-mark, and that it must be taken that the plaintiffs after the abandonment adopted the trade-mark as their own, and their goods have acquired a fresh reputation under the mark. But this is not the case set up in the pleadings; the plaintiffs claim that they are the assigns of Kabasi and this is the basis of their suit. Nor is it easy to see how the plaintiffs can claim that their goods have got a fresh and independent reputation under the mark, when the first lot of the plaintiff's cigarettes were sold in packets bearing the name 'Hindusthan Cigarette Co.' which business was not theirs and, since they have abandoned the use of that name, they have sold the cigarettes without any name on the packets."

From this judgment, the plaintiff Company appealed.

Mr. Jackson (with him *Mr. Buckland* and *Mr. Langford James*), for the appellant Company, contended that the assignment of the 2nd September, 1908, was good in law and operative. There was nothing in law to prevent the appellants from obtaining an assignment of the one "Sri Durga" mark out of the four trade-marks, and the goodwill appertaining thereto; there can be no question about the divisibility of goodwill; the goodwill of a business may be sold and assigned irrespective of the actual manufacture; goodwill is separable from the manufacture: *Pinto v. Badman* (1), *Trego v. Hunt* (2), *Inland Revenue Commissioners Muller & Co.'s Margarine, Limited* (3), *In re Magnolia Metal Company's Trade-marks* (4), *Rickerby v. Reay* (5), *West London Syndicate v. Inland Revenue Commissioners* (6), *Hammond v. Malcolm* (7), *Hall v. Barrows* (8), *McAndrew v. Bassett* (9), *Throneloe v. Hill* (10), *Kerly on Trade-marks*, 3rd edition, pp. 345, 352, 355, 367. If it is held the assignment was inoperative, it is submitted, the appellant Company by subsequent user, acquired an independent title to the mark.

Mr. B. C. Mitter (with him *Mr. C. C. Ghose*), for the respondent. The pleas raised are inconsistent. It is not open to the appellants to claim a title by assignment, and at the

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(1) (1891) 8 R. P. C. 181.

(2) [1896] A. C. 7.

(3) [1901] A. C. 217.

(4) [1897] 2 Ch. 371.

(5) (1903) 20 R. P. C. 380.

(6) [1898] 2 Q. B. 507.

(7) (1892) 8 T. L. R. 324.

(8) (1863) 4 DeG. J. & S. 150.

(9) (1864) 4 DeG. J. & S. 380.

(10) [1894] 1 Ch. 569.

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same time contend there had been abandonment by the assignor, and that the appellants had acquired an independent reputation. The only question is whether the assignment was void, as being an assignment in gross of a trade-mark. It is submitted on the authorities, the assignment was void: *Licensed Victuallers' Newspaper Company v. Bingham* (1), *McAndrew Bassett* (2), *Leather Cloth Company v. American Leather Cloth Company* (3), *Pinto v. Badman* (4), Kerly on Trade-marks, p. 490. The authorities cited on behalf of the appellant Company do not support the appellants' argument.

Mr. Jackson, in reply.

Cur adv. vult.

JENKINS C.J. This suit is brought by the British American Tobacco Company, Ltd., against Sheikh Mahboob Buksh and Mahomed Ismail for a declaration that the plaintiff Company are the proprietors of the trade-mark, name and label described in the plaint; for an injunction against the defendants restraining them from infringing the same; for an account of profits, and for incidental relief including a claim for damages.

The case made by the plaint is that Kusi Lal Kabasi was the proprietor of a trade-mark, name and label, known as "Sri Durga" which was used by him upon packets of cigarettes sold by him and known as "Sri Durga" cigarettes: that by an Indenture of the 2nd of September, 1908, Kabasi assigned to the plaintiff Company "all that the trade-mark, name and label known as the "Sri Durga" trade-mark, name and label used upon packets of cigarettes, and the goodwill of his said business so far as the same related thereto:" that since the 2nd of September, 1908, the plaintiff Company extensively used the trade-mark, name and label upon cigarettes manufactured and sold by them and also the words "Sri Durga" as a trade-mark upon the cigarettes sold by them: that by reason of such user the plaintiff Company's cigarettes marked with the trade-mark, name and label and words "Sri

(1) (1888) L. R. 38 Ch. D. 139. (3) (1865) 11 H. L. 523.

(2) (1864) 4 DeG. J. & S. 380. (4) (1891) 8 R. P. C. 181.

Durga" have become known to purchasers or intending purchasers as "Sri Durga" cigarettes in the cigarette trade, and "Sri Durga" cigarettes in the cigarette trade mean the cigarettes made and sold by the plaintiff Company: and that the defendants have infringed the plaintiff Company's trade-mark and the employment of labels by the defendants is an unlawful imitation of the get-up of plaintiff Company's good. The defendants on the other hand claim to have invented the trade-name of "Sri Durga" as applied to cigarettes and to be the exclusive owners of it: that on the 29th of July they caused the "Sri Durga" brand with the name and label to be registered or notified: that they sold the "Sri Durga" brand of cigarettes in and from the month of August, 1908, under the same design: that the user by Kabasi was an infringement of their trade-mark: that the plaintiff Company acquired by the Indenture of 2nd September, 1908, no title to the trade-mark: and that the defendants' cigarettes bearing the trade-mark and label were in the market before the plaintiff Company's.

The case was heard by Fletcher, J., who dismissed the suit with costs, holding that the plaintiff Company did not by the Indenture of the 2nd September, 1908, acquire from Kabasi the exclusive right of using the trade-mark, and that since that date they had not acquired any new exclusive right to the user of the mark.

From this decree the present appeal is preferred.

It will be seen that the plaintiff Company by their plaint allege two titles to the trade-mark: the first is a derivative title from Kabasi; the second is an independent title in themselves. I will first deal with the derivative title.

In India there is no system of registration nor is there any provision for a statutory title to a trade-mark, so that the rights of the parties must be determined in accordance with the principles of the English Common Law.

Now a trade-mark is a mode of warranting the origin of the goods to which it is attached, or their trade association, and it is of the essence of a trade-mark that its representation should be true.

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In this, I think, is to be found the true test and measure of the assignability of a trade-mark. This is borne out by what was said by Lord Kingsdown in *Leather Cloth Company v. American Leather Cloth Company* (1), in meeting an argument advanced by Counsel for the appellants who urged that the doctrines laid down in the judgment then under appeal, if pushed to their legitimate consequences, would prevent any assignment. Lord Kingsdown dealt with that argument as follows:—

“It was said that if this principle be pressed to its fullest extent it will prevent the use of the name of a firm by any but the original partners, and will, of course, prevent, on a transfer of the business, the right to use the name by any other persons. But the answer to this is, that by usage of trade the name of a firm is understood not to be confined to those who first adopted it, but to extend to and include persons who had afterwards been introduced as partners, or persons to whom the original partners have transferred their business. The name of the firm continues to be used in many cases long after all the original traders have died, or ceased to have any interest in the concern, as in the great banking houses of Child and Coutts, and many other mercantile houses.

If a manufacturing house uses the name of the firm, and stamps the name of its firm upon its goods, though the name of the firm no longer represents the same persons as at first, it is no fraud upon the public, for the reasons I have already alluded to.

For the same reason, the use of the old trade-mark of the firm by the new partners or their successors (if the term ‘trade-mark’ be understood in what I have already said is its proper sense) is no fraud upon the public: it is only a statement that the goods are the goods of the firm whose trade-mark they bear.”

Lord Cranworth lays down the law in similar terms. The same idea is also expressed by Lord Westbury in *Hall v. Barrow* (2), when he says, “If a name impressed on an vendible commodity passes current in the market as a statement

(1) (1865) 11 H. L. C. 523, 542. (2) (1863) 4 DeG. J. & S. 150.

or assurance that a commodity has been manufactured by a particular individual, it may be that the Court would not sell the right to use that name without addition: but if it sold the business or manufacture carried on by the owner of the name it might give to the purchaser the right to represent himself as the successor in business of the first maker and in that way entitled to use the name." So again in *Singer Manufacturing Company v. Wilson* (1), it was said by Mellish L.J. "The Courts of Equity having taken that step, trade-marks began to be considered as property, and no doubt there is in a certain sense a property in a trade-mark and equally in a trade-name, because a trade-name may be used, and is very commonly used as a trade-mark properly so called—that is a trade-mark upon the goods themselves. Then both a trade-mark and a trade-name were allowed to be sold as part of the goodwill of the business. When a new partner came into a mercantile firm amongst other rights which he purchased by coming into that firm was the right to use the trade-name or trade-marks belonging to that firm. Even when an entire business was sold to a new purchaser the right to use the trade-name and trade-marks passed with it and in that sense they become property." It is to be noticed that Lord Justice Mellish limits the passing of a trade-mark to the case where the entire business, of which it is a part, is sold. Similarly Lord Blackburn in *Singer Manufacturing Company v. Loog* (2), says: "Both trade-marks and trade-names are in a sense property and the right to them passes with the goodwill of the business to the successors of the firm that originally established them, though the name of the firm be changed so that they are no longer strictly correct." The sense in which they are correct is explained in that passage from Lord Kingsdown's judgment which I have already cited. Then in *Pinto v. Badman* (3), Fry L.J. lays down as to the transfer of a trade-mark that, "It may be assigned if it is indicative of its origin when the origin is assigned with it. It cannot be assigned when it is divorced from its place of origin or when

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(1) (1876) L. R. 2 Ch. D. 434, 454. (2) (1882) L. R. 8 A. C. 15, 33.

(3) (1891) 8 R. P. C. 181.

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in the hands of the transferee it would indicate something different to what is indicated in the hands of the transferor." And to the same effect the same Lord Justice says in *Edwards v. Dennis* (1), "no trade-mark can be assigned except in connection with the goodwill of the business in which it has been used, which business must be co-extensive with the goods or classes of goods in respect of which the trade-mark is registered." I have discussed this question at some length because it was argued before us with evident earnestness that all that was required to validate the assignment of a trade-mark was that some particle of goodwill should also be transferred, and that there was such a transfer of goodwill on the 2nd of September, 1908, as to comply with the rule that a trade-mark cannot be transferred in gross.

The cases to which I have referred explain the meaning of the rule which is expressed in this formula, and what we are concerned with is, not whether there may have been a verbal compliance with the condition that an assignment of goodwill must accompany or follow the transfer of a trade-mark, but whether, if the assignment were valid, the trade-mark would still continue to be a representation of the truth, within the limits of deviation sanctioned by the usage of trade and commerce.

What then are the facts of this case? Kabasi, who purports to assign the trade-mark "Sri Durga," was at the time of the assignment a tobacco merchant carrying on business under the style of the Hindustan Cigarette Company, and dealing in cigarettes of different brands. He also claimed to be entitled to four trade-marks in connection with these cigarettes consisting of picture representations of the Hindu gods, Gopal, Jugal, Jagat-dhatri and Durga and these four, he deposed, he used indiscriminately. It does not appear that there was in any sense a separate business in respect of each or any of the cigarettes sold under these several brands; only one book was used, and it does not even appear that separate accounts were opened. Nor has it been shown that the several marks indicated the use of a different tobacco,

or any difference in manufacture. In fact Kabasi in reply to the Court said, "a great reputation was created by the brands, it was especially made with a special flavour," not suggesting that one brand differed from another. And as to the marks Mr. Page, the plaintiff Company's principal representative in Calcutta, says, "between 'Sri Durga' and 'Jagat Dhatri' purchasers might mistake the two."

The assignment, however, does not purport to extend to Kabasi's entire business or to include all his marks; it is expressed to be merely an assignment of "all that the trade-mark, name and label known as the 'Sri Durga' trade-mark, name and label and used upon packets of cigarettes sold and known as 'Sri Durga' cigarettes and the goodwill of his said business so far as the same relates thereto." The plaint in this case contains no precise statement of what the trade-mark "Sri Durga" denoted while Kabasi still was its "proprietor," but it may, as counsel for the plaintiff Company contends, be read as meaning that the trade-mark represented that Kabasi was the seller of the goods (see paragraphs 2 and 3). Mr. Jackson in his argument on behalf of the plaintiff Company has amplified this by alleging that it denoted that "the goods were manufactured and sold, or sold by Kabasi." Have we then here such an assignment of the goodwill of Kabasi's business or of any part of it, as by the usage of trade would sanction the view that the plaintiff Company were the successors to the firm or business in a sense which would render the representation of the trade-mark commercially true? I think not, and to hold otherwise might lead to most embarrassing results. Without in any way suggesting that a man or a firm may not have a distinct business capable of separate assignment, it appears to me that for the purpose in hand it is straining the argument beyond breaking point to urge that a cigarette seller may have as many businesses as the brands of cigarettes he sells. I have carefully considered the several cases that have been cited to us as to the divisibility of the goodwill of a business, but not one of them appears to me to bear out the proposition for which the plaintiff Company are forced to contend in this case. And, after all, the ques-

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tion with which we have to deal is substantially one of fact: does the trade-mark "Sri-Durga" when used in connection with the plaintiff Company's cigarettes still continue to be a correct representation? Are the plaintiff Company as the assignees under it able, in accordance with trade usage, to claim that they are the successors to Kabasi's business and as such entitled to represent by the trade-mark that the cigarettes are "manufactured and sold or sold" by Kabasi?—for that is the representation that is ascribed by the plaintiff Company to the trade-mark so far as their right to sue rests on the Indenture of assignment. In my opinion this must be answered in the negative and I therefore hold that for the purposes of this suit the plaintiff Company did not acquire under the Indenture any title which would give them a right to a decree against the defendants.

This brings me to the second point urged on behalf of the plaintiff Company which is formulated in these terms in the memorandum of appeal: "the learned Judge should have held that the plaintiff Company had acquired and enjoyed the exclusive right of using the said trade-mark by prior use irrespective of the said assignment."

Now, what are the facts as to this? It is the plaintiff Company's case that, at the time of the assignment, and at the date of the alleged infringement, the trade-mark denoted a connection of the cigarettes with Kabasi to the benefit of which the plaintiff Company are entitled by virtue of the assignment. On this the learned Judge has held in their favour as to the denotation of the trade-mark and has even gone the length of saying that "if Kabasi had remained the owner of this mark and continued his business, I should on the evidence have held that he was entitled to restrain the defendants from using it." The plaintiff Company have adopted this conclusion before us and indeed their first and principal contention has been here, as it obviously was before Fletcher J., that by assignment they became entitled to this trade-mark and the benefit of its denotation.

We have not been asked by the plaintiff Company to disturb the learned Judge's view on this point and therefore I

think we should for the purposes of this appeal assume its correctness as against the plaintiff Company who rely on it.

But if this be so, how can the plaintiff Company be heard to say that if the assignment is ineffective the trade-mark has a different denotation: this is not the presentation of an alternative contention, but is to approbate and reprobate, for the representation of the trade-mark is in no way dependent on the validity of the assignment. The matter is discussed by Fletcher J. in his judgment where he remarks that this is not the case set up in the pleadings. It is contended that in so saying the learned Judge overlooked paragraph (6) of the plaint. But this misses the point made by the learned Judge, for though he does not elaborate his reasons, he doubtless meant that paragraph 6 could only have application if it were held that the mark had not acquired a reputation before the 2nd of September, 1908. And this becomes the more apparent from his comment that "the plaintiffs claim that they are the assigns of Kabasi and this is the basis of their suit." The learned Judge continues "nor is it easy to see how the plaintiffs can claim that their goods have got a fresh and independent reputation under the mark when the first lot of the plaintiff's cigarettes are sold in packets bearing the name 'Hindustan Cigarette Company' which business was not theirs, and since they have abandoned the use of that name they have sold the cigarettes without any name on the packets."

The conclusion at which the learned Judge came, was, that since the date of that attempted assignment the plaintiff Company had not acquired any new exclusive right to the user of the mark. The whole of the evidence called on behalf of the plaintiff Company has been placed before us, and I agree with the conclusion of the learned Judge. In seeking to rely on their own user, irrespective of the assignment, they in effect are endeavouring to overthrow the reputation in Kabasi which they have not only alleged but succeeded in establishing, for a trade-mark cannot make conflicting representations. This contention involves the theory that there had been an abandonment of the trade-mark as denoting a connection with

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Kabasi, and it would be obviously unfair to the defendants to allow the plaintiff Company to start a case of abandonment at the close of the trial when no such case was suggested in the plaint and no issue was raised on the point.

And even now abandonment has not been made a ground of appeal.

But apart from this, the record supports no such case: the evidence shows that the cigarettes were sold by the plaintiff Company in boxes on which the name Hindustan Cigarette Company appeared in conjunction with the picture of "Sri Durga" on the 19th of September, 1908, nor does the evidence show when that name was discontinued. This, however, is clear, that on the box which is made exhibit A to the plaint and in relation to which the declaration of title and relief is sought, the name still appears.

The significance of this is that it was under this name that Kabasi traded and indeed continued to trade even after the execution of the Indenture of assignment. Moreover, I can see no reason to suppose that it was a part of the plaintiff Company's policy to have the name of their company directly associated with the "Sri Durga" mark, for the evidence led by them tends to show that this association would not promote the sale of cigarettes. Nando Lal Ghosh says, "this picture would be liked by all Hindu people—would understand these cigarettes were made by Hindus and this would be a reason for its rapid sale. We sell those cigarettes as Swadeshi. I don't like to tell my customers that pictures had been put on by Christian firm, that is a firm owned by the British and Americans. It would affect the sale if customers knew the cigarettes were made by unbelievers." So again Surendra Nath Doss, another of the plaintiff Company's witnesses says, "Durga cigarettes sell very largely on account of the Swadeshi trend of the people," and Rai Churn Ghose, also one of these witnesses deposes, "I said my customers came back and asked for "Sri Durga" cigarettes because they were Swadeshi cigarettes." While Kali Charn Mitter one of the principal dealers says "pictures of gods and goddesses indicate they are Swadeshi articles."

It is difficult to believe that the plaintiff Company were unaware of this, and it affords an additional reason for thinking that there was no such abandonment and fresh acquisition of reputation as this second branch of the plaintiff Company's argument implies. The result then is that the plaintiff Company has, in my opinion failed to establish either of their contentions, and I therefore hold that the decree of Fletcher J. should be confirmed and this appeal be dismissed with costs.

WOODROFFE J. I agree.

J. C.

Appeal dismissed.

Attorneys for the appellants: *Leslie & Hinds.*

Attorneys for the respondents: *Orr, Dignam & Co.*

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CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Sharfuddin.

SAGAR CHANDRA MANDAL

v.

DIGAMBAR MANDAL *

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July 22.

Decree—Irregularity—Decree, not drawn up—Contents of decree—Costs—Practice

It is the duty of a Court to draw up a decree after a case has been decided, and the decree should show the costs incurred by the parties.

CIVIL RULE obtained by the plaintiff.

This was a rule to show cause why the order of the Court below refusing to draw up a decree, showing costs incurred by the parties in a suit, decided there, should not be set aside.

Babu Prabhaschandra Mitra, for the petitioner.

Babu Haricharan Sarkhel, for the opposite party.

MOOKERJEE AND SHARFUDDIN JJ. This is an application by the appellant in appeal from Original Decree No. 514 of 1907. This appeal was allowed on the 20th August, 1909, by this Court, and we directed that the appellant should recover from the respondent his costs both here and in the Court below.

* Civil Rule, No. 854 of 1910, against the order of G. Gordon, District Judge of 24-Parganas, dated Jan. 29, 1910.

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The decree drawn up by this Court showed the costs incurred by the appellant in this Court; and it further declared that the defendant-respondent was to pay to the plaintiff-appellant the costs incurred by him in the lower Court with interest thereon at the rate of six per cent. per annum from the date of the decree of the lower Court until realization. The plaintiff found that no decree had been drawn up by the Court below in which the costs incurred by him were entered. He, thereupon, made an application to the learned District Judge and prayed that a decree might be drawn and the amount of costs incurred by him entered therein. The learned District Judge refused that application and recorded the following order: "I think the High Court decree should show the costs and no decree can be prepared here. The application to amend the decree must be filed in the High Court." This order is wholly erroneous. The High Court decree cannot show the costs incurred by the parties in the Court of first instance; nor can this Court undertake to calculate the amount of costs incurred by the parties in the subordinate Court. The District Judge in the first instance committed an error in not drawing up a decree. His judgment shows that he dismissed the application for probate with costs and assessed the pleader's fee at Rs. 48; a decree ought to have been drawn up in due course showing all the costs incurred by both the parties. When this omission was brought to his notice by the successful appellant, he held that the application must be filed in this Court. We are unable to appreciate upon what conceivable principle such a view can be adopted.

The result, therefore, is that this rule must be made absolute and the order of the Court below dated the 29th January 1910, discharged. The District Judge must now take up the application presented to him on the 5th January, 1910, and draw up a decree showing the costs incurred by the parties in the Court below. There will be no order as to the costs of this rule, as it has not been opposed, and the opposite party does not appear to be responsible in any way for the erroneous order made by the District Judge.

S. M.

Rule absolute.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice
and Mr. Justice Woodroffe.*

ANGLO-INDIA JUTE MILLS CO.

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July 26.

Vendor and Sub-vendee—Estoppel—Unpaid Vendor—Appropriation—Jute trade usage of—Pucca delivery orders—Negotiability—Documents of Title—Indian Contract Act (IX of 1872) s. 108—Transfer of Property Act (IV of 1882) s. 137.—Damages.

A delivery order is recognised as a document of title under section 108 of the Contract Act and section 137 of the Transfer of Property Act, and under a delivery order the transferee acquires a title to the goods to which it relates.

By the usage of the jute trade in Calcutta, *pucca* delivery orders are issued only on cash payment, are passed from hand to hand by endorsement, and are sold and dealt with in the market as absolutely representing the goods to which they relate.

On the 1st March, 1909, the defendant company sold to J. & Co.'s principals certain Hessian cloth on the terms that "payments were to be made in cash in exchange for delivery order on sellers, and delivery of the goods was to be given and taken ready payment against *pucca* delivery order." A *pucca* delivery order was issued on the 2nd March by the defendant company in favour of J. & Co.'s principals or order, embodying the term "ready shipment." On the 3rd March J. & Co. requested the plaintiffs to advance money on the security of the delivery order. The plaintiffs on making enquiries at the mills were informed the delivery order was "all right." On the 4th March J. & Co. obtained an advance of money from the plaintiffs on the pledge of the delivery order and duly endorsed the delivery order to the plaintiffs. On the same date J. & Co. handed the defendant company a cheque in payment of the goods comprised in the delivery order. On the 8th March the defendant company presented the cheque for payment, but it was dishonoured. The defendant company thereupon refused to give delivery of the goods to the plaintiffs under the delivery order. The plaintiffs obtained an absolute release of all J. & Co.'s interest in the delivery order, and brought an action against the defendant company for delivery of the goods or their value or damages for conversion.

* Appeal from Original Civil No. 20 of 1910.

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*Held*, that the defendant company were estopped from denying that cash had been paid for the goods to which the delivery order related and they could not claim to be entitled to a lien as against the plaintiffs. The defendant company were further estopped from denying that they had appropriated goods of the required quantity and description to the delivery order, and that they held these goods for the plaintiffs.

*Goodwin v. Roberts* (1) referred to.

APPEAL by the defendant Company from the judgment of Fletcher J.

This appeal arose out of a suit brought by the firm of Chandermull Serahmull of which firm Omademull was a partner, and one Luchminarain Kanoria against the Anglo-India Jute Mills Company, Ltd., for delivery of 100,000 yds. of Hessian cloth and damages, or for the value of the goods with damages, or for the sum of Rs. 7,750 as damages for the conversion of the goods.

On the 1st March 1909 the defendant company sold 3,00,000 yds. Hessian cloth of their standard make quality, weight, and size, as mentioned in the margin of the contract, at Rs. 7-12 per 100 yds. free alongside export vessel in the Port of Calcutta subject to certain conditions of which the following are material to the present action:—

3. "Payments to be made in cash in exchange of delivery order on sellers or for Railway Receipts or for Dock Receipts or for Mates Receipts (which Mates Receipt are to be handed by Ships' Officer to the Sellers' representative), etc."

5. "Delivery of the said goods to be given and taken as follows:—Ready payment against Pucca delivery order."

In the sold note sent to the defendant company by the brokers, Messrs. Janki Dass & Co., the same was expressed to be to the brokers' principals. The form of contract used was the common form of contract used by the Indian Jute Manufacturers Association.

On the 2nd March 1909 the defendant Company signed three delivery orders M 1/50, M 1/51, M 1/52 each for 1,00,000 yds. Hessian cloth in respect of the contract. The delivery



order, the subject matter of this suit, was in the following terms:—

“Anglo-India Jute Mills Company, Limited.  
(Delivery Order.)

Calcutta, 2nd March, 1909.

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To The Manager,

Middle Mill.

Please deliver to Messrs. Janki Dass & Co.'s Principals or order 50 Bls. 1,00,000 yds. Hess. Cloth 40 in.  $7\frac{1}{2}$  oz., 9 by 9 each 2,000 yds. (One Hundred thousand yards only). Ready Shipment Rs. 113.

For Anglo-India Jute Mills Co., Ltd.

Pro. DUNCAN BROTHERS & Co.

J. B. Craik,

Agents.

Covered under fire under Mill Insurance Policies.”

It did not appear whether these delivery orders were handed to Janki Dass & Co. on the 2nd March. But the delivery orders were in their possession on the 3rd March. On that date the plaintiff Luchminarain met Nando Kishore, a partner of Messrs. Janki Dass & Co., near the office of the defendant company, and he was asked by Nando Kishore to advance money on the security of the three delivery orders, to which he assented. Luchminarain thereupon took the three delivery orders to the office of the defendant company and showed them to Mr. Young, an assistant in the firm, who in reply to his enquiry, whether the delivery orders were correct or in order, informed him that they were “all right.” Luchminarain then came out of the office and returned the delivery orders to Nando Kishore, telling him that he would get money the following day from the plaintiffs’ firm of Chandermull Serahmull. On the same day Luchminarain went to that firm and informed them that the sum of Rs. 18,000 would have to be paid the following day to Janki Dass & Co. on *pucca* delivery orders.

On the 4th March the three delivery orders were endorsed to the plaintiffs by way of pledge and a sum of Rs. 18,000 bearing interest at 12 per cent. was advanced on the security of the delivery orders and paid into Janki Dass & Co.’s account with the Bengal National Bank. On the same date

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Messrs. Janki Dass & Co. drew in favour of the defendant company a cheque, dated the 5th March, on the Bengal National Bank for Rs. 19,375 in payment of the goods comprised in the delivery orders. This post-dated cheque was in fact not paid into the defendant company's Bank till the 8th March when it was dishonoured.

It appears that on the 2nd March Janki Dass & Co. were in financial difficulties, and that they had running a considerable number of contracts with the defendant company, for which delivery orders had been handed to them, and it appeared that though the sum of Rs. 18,000 received by Janki Dass & Co. from the plaintiffs did not actually go to pay what was payable on the post-dated cheque, the sum of Rs. 15,000 out of the Rs. 18,000 went on the 4th March to satisfy other claims of the defendant company, *viz.*, two other post-dated cheques of the 3rd March, which they had received from Janki Dass & Co. in respect of other transactions.

The plaintiffs duly demanded delivery from the defendant company of the goods represented by the three delivery orders and on the defendant company's refusing to deliver the same, the plaintiffs called upon Janki Dass & Co. to repay them the sum of Rs. 18,000 and return the orders. Janki Dass & Co., however, not being in a position to pay the sum, the plaintiffs were compelled, on the 8th April, 1909, to come to an agreement with them whereby the delivery order No. M 1/50 was released absolutely to the plaintiffs, the other two delivery orders being re-transferred to Janki Dass & Co. in consideration of the payment of the sum of Rs. 10,800.

On the 19th July 1909 the present suit was instituted by the plaintiffs for the purpose of enforcing their rights under the delivery order No. M 1/50.

It was contended by the plaintiffs "that the delivery orders were known in Calcutta as *pucca* mills delivery orders and by the usage and practice in Calcutta such orders were taken and understood to be documents of title or equivalent thereto and passed freely from hand to hand by indorsement and were dealt with in the market for raising money either by sale or pledge, that the defendant company and their

agents were well aware of such usage and practice, when they issued such delivery orders and intended when they issued the same that they should be sold or dealt with in the market and money obtained upon them and that the right to claim delivery of goods to the amounts represented by the said orders should become vested in the holder or holders of the said orders by indorsement thereon; that the defendant company had accepted the cheque as payment or was in any event estopped from disputing the fact of payment as against the plaintiffs and that the plaintiffs were entitled to delivery order No. M 1/50 and the goods represented thereby and to receive the goods from the defendant company, that the value of the 1,00,000 yards of Hessian cloth was at the date of suit less by 8 as. per 100 yds. than at the date of the delivery order and that the plaintiffs had sustained loss and damage to the extent of Rs. 7,750."

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The defendant company resisted the plaintiffs' claim. They contended that they were unpaid sellers of the goods and that they had a lien on them so long as they remained in their possession, and the price or any part of it remained unpaid. It was denied that the delivery orders in suit were taken to be equivalent to documents of title by any trade usage in Calcutta. It was alleged that the delivery orders represented no ascertained or specific goods nor had any appropriation been made to the delivery orders. The plaintiffs' title to the delivery orders and to any goods represented thereby was denied, and it was pointed out that the plaintiffs had entered into the agreement of the 8th April 1909, with full notice of the defendant company's claims. It was submitted that no grounds had been laid to found any estoppel.

It was established in evidence that delivery orders of the nature of the one in suit, passed from hand to hand by endorsement and were sold and dealt with in the market; that according to the invariable course of dealing in the Calcutta jute trade delivery orders were only issued on cash payment, and were dealt with in the market as absolutely representing the goods to which they related and free from any lien of the seller.

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The circumstances attending the interview of the 3rd March 1909 between Luchminarain and Mr. Young were denied by the defendant company, but no evidence was called to support the denial; nor was any evidence adduced by the defendant company to prove their allegation that the goods indicated by the delivery order No. M 1/50 had never in fact been ascertained.

The suit came on for hearing before Fletcher J., who on the 18th February 1910, passed judgment in favour of the plaintiffs. After setting out the facts, his Lordship proceeded:—

“The first ground that the plaintiffs have based their claim in the present suit is one that arises under Exception 1 to Section 108 and Section 178 of the Indian Contract Act, 1872.

“The wording of those two sections, however, to my mind, show clearly that they refer to ascertained goods and there cannot be a document of title relating to unascertained goods. The delivery order in this case does not refer to ascertained goods and therefore is not a document showing title to goods. The general provisions of section 108 that a seller cannot give a buyer a better title to goods than he has himself, coupled with section 98 which enacts that a seller in possession of goods sold may retain them for the price against any subsequent buyer, unless the seller has recognised the title of the subsequent buyer, disposes of the first head of the argument on behalf of the plaintiffs.”

His Lordship then discussed the evidence as to usage and came to the conclusion:—

“That when a person issues one of these delivery orders he knows that it will pass from hand to hand by indorsement and that the indorsee is to have the right to call for the goods free from any claim by the vendor for the purchase money.....and that in these circumstances the principles laid down in *Merchant Banking Company of London v. The Phoenix Bressemer Steel Company* (1) applied to the present case.”

His Lordship came to the further conclusion:—

“That the present case fell within the principles laid down in the cases of *Knights v. Wiffen* (2), *Woodley v. Coventry* (3), *Ganges Manufacturing Co. v. Sourujmull* (4) and that accordingly the defendants were estopped from denying that plaintiffs' title.”

(1) (1877) L. R. 5 Ch. D. 205.

(3) (1863) 2 H. & C. 164.

(2) (1870) L. R. 5 Q. B. 660.

(4) (1880) I. L. R. 5 Calc. 669.

On the question of the amount the plaintiffs were entitled to recover, his Lordship observed:—

“The amount remaining due on the pledge by Janki Dass & Co. to the plaintiffs is Rs. 7,200 and this sum at any rate they are entitled to recover. The value of the Hessian cloth during the month of March 1909 was amply sufficient to meet this sum. I accordingly give judgment for the plaintiffs for Rs. 7,200 and costs on scale No. 2.”

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From this judgment the defendant company appealed.

*Mr. Zorab* (with him *Mr. Buckland*), for the appellant company. The suit as framed was a suit for the recovery of property and not a suit on a contract. Accordingly section 1 of the Indian Contract Act, which introduces the consideration of usage and custom of trade, has no application. Moreover a custom to have any value, must be sufficiently established to have the authority of law. Here there was a conflict of testimony as to what the custom of trade was. If the delivery order in suit were held to be negotiable, it must follow that the indorsement to have had any legal effect should have been strictly regular, whereas the delivery order was “to Messrs. Janki Dass & Co.’s Principals or order,” and the indorsement was by Janki Dass & Co. themselves. The delivery order was not a negotiable instrument: hence mere indorsement was not sufficient to pass title: a proper assignment was necessary. It was submitted, however, that even an assignment would have been useless as the delivery order was not a document of title. Under no circumstances could a delivery order for unascertained goods be regarded as a document of title. The question then resolved itself into this, were the defendant company estopped from contending that the delivery order was not a document of title? Sections 108 and 178 of the Contract Act embody the whole law of estoppel of this nature. If the plaintiff desired to raise an estoppel against the defendant company, he must bring himself within the purview of one or other of those sections. Now a delivery order was in the nature of a promise to deliver and not a representation of a fact which was essential to raise an estoppel. The mere issue of the document was not sufficient to raise an estoppel. Moreover the delivery

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order was not a document of title. Again, although, the plaintiffs may have become pledgees of the delivery order without notice, admittedly they became purchasers with full notice of the claims of the defendant company: the suit has been brought by the plaintiffs as purchasers. There were no circumstances from which the inference could be drawn that the defendant company issued the delivery order with the intention of enabling Janki Dass & Co. to raise moneys. Fletcher J. relied on the authority of *Merchant Banking Company of London v. Phoenix Bessemer Steel Company* (1). That case was decided on the particular facts of the case: it was held that it was the intention of the person giving the warrant that it should be used for the particular purpose. In the present case the delivery order had no fixed form, nor was it in precise terms, nor was there any evidence of custom that by the issue of the delivery order, a liability to deliver was created, although the vendor remained unpaid. The evidence of the interview with Mr. Young should be discredited: at any rate whatever Mr. Young may have said could not amount to a representation (i) that cash had been received for the delivery orders or (ii) that the defendant company held the goods on behalf of sub-vendors, or (iii) that goods were ascertained or appropriated to the contract.

Mr. B. C. Mitter (with him Mr. Sircar and Mr. Langford James), for the respondents. There was ample evidence of the custom or usage of the jute trade that delivery orders were never issued except for cash. Hence where a delivery order was issued, there was a representation that cash had been paid. A complete case of estoppel arose quite apart from the question whether the documents were negotiable or not. Further the issue of the delivery order estopped the mills from submitting that the goods were not ascertained or appropriated.

Mr. Zorab, in reply.

*Cur. adv. vult.*

(1) (1877) L. R. 5 Ch. D. 205.



JENKINS C.J. This appeal arises out of a suit brought by the firm of Chandermull Serahmull and one Luchminarain Kanoria against the Anglo-India Jute Mill Company, Ltd., for delivery of 1,00,000 yards of Hessian cloth and damages, or the value of the goods with damages, or for Rs. 7,750 as damages for the conversion of the goods.

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A decree has been passed in the plaintiffs' favour by Fletcher J. and from this the defendant company have appealed.

The facts are these: on the 1st March 1909 the defendant company sold 3,00,000 yards of Hessian cloth and in the sold note sent to them by the brokers Messrs. Janki Dass & Co., the sale was expressed to be to the brokers' principals. Under the incorporated conditions payments were to be made in cash in exchange for delivery orders or on certain other specified terms which have no application in this case (paragraph 3) and delivery of the goods was to be given and taken on the terms "Ready payment against Pucca Delivery order." Three delivery orders Nos. M 1/50, M 1/51 and M 1/52 bearing the date the 2nd March 1909 were issued by the defendant company to Messrs. Janki Dass & Co. by whom they were pledged to the firm of Chandermull Serahmull to secure repayment with interest of the sum of Rs. 18,000 then advanced by the plaintiff firm to Messrs. Janki Dass & Co. The plaintiff Luchminarain Kanoria was also interested in the advance. Subsequently an agreement was made between the plaintiffs and Messrs. Janki Dass & Co. under which for valuable consideration the plaintiffs gave up the delivery orders M 1/51 and M 1/52 and obtained from Messrs. Janki Dass & Co. an assignment of their equity of redemption in delivery order M 1/50 and the 1,00,000 yards of Hessian cloth represented thereby. It is on this delivery order, M 1/50 that the plaintiffs' present claim is based. The defendant company resist the plaintiffs' claim on the ground that they are unpaid sellers of the goods, and that they have a lien on them so long as they remain in their possession, and the price or any part of it remains unpaid.

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So far I have merely set out the broad outline of the case; the details still have to be filled in.

The plaintiffs' version is that on the 3rd March the plaintiff Luchminarain met Nando Kishore, a partner in Messrs. Janki Dass & Co., near the office of the defendant company, that he was asked by Nando Kishore to make an advance on three delivery orders of the defendant company to which he assented, that he took the three delivery orders being those with which we are concerned in this suit, to the office of the defendant company, where he showed them to Mr. Young, who, in reply to his enquiry whether the delivery orders were correct or in order, assured him they were all right. Luchminarain says that he then came out of the office and returned the delivery orders to Nando Kishore telling him that he would get money the following day from Chandermull Serahmull, and that on that same day he went to that firm and informed them that Rs. 18,000 would have to be paid the following day to Janki Dass & Co. on pucca delivery orders.

The whole of this incident is denied by the defendant company, but Fletcher J. accepted it as true, and I think we ought to accept his view as correct, and more especially as it is uncontradicted though it was within the power of the defendant company to have called evidence to show that no such incident occurred. It may be that Mr. Young's absence from India, prevented his being called, but it obviously was within the defendant company's power to call evidence from their own office that the delivery orders were not then issued, if as their counsel has argued that, that was the fact, and they could have called Nando Kishore to deny the visit to the defendant company's office on the 3rd with the delivery orders, if that story was untrue. Counsel for the defendant company suggested in explanation of this omission that relations with Nando Kishore were strained, but for this suggestion there is no foundation in the evidence: on the contrary it appears from the judgment of Fletcher J. and it is not disputed that members of the firm of Janki Dass & Co. were sitting behind Counsel for the defendant company and

produced certain documents in the course of the trial and it was further admitted that the defendant company opened a ledger account of Janki Dass & Co. since August 1909, though they had not got one on the previous 4th March. On the 4th the delivery orders were handed to the plaintiffs and the sum of Rs. 18,000 was advanced and was paid into Janki Dass & Co.'s account with the Bengal National Bank.

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On the same date Messrs. Janki Dass & Co. handed the defendant company a cheque dated the 5th, but this post-dated cheque was in fact not paid into the defendant company's bank till the 8th of March when it was dishonoured. The defendant company have given no evidence in explanation of this delay, but the plaintiffs show from Janki Dass & Co.'s Pass-book, which was by consent admitted in evidence before Fletcher J., that though the Rs. 18,000 received from the plaintiffs did not actually go to pay what was payable on the post-dated cheque, almost the whole of it went to satisfy other claims of the defendant company.

The delivery order in suit was in these terms:—

“Please deliver to Messrs. Janki Dass & Co.'s Principals or order 50 Bs.=100,000 yds. Hessian Cloth 40 in. 7½ oz. 9×9 each 2,000 yds. (One hundred thousand yards only) ready shipment Rs 113.”

This delivery order was indorsed to the plaintiffs by way of pledge on the 4th of March and this the plaintiffs maintain entitles them in the circumstances to the decree Fletcher J. has passed in their favour. The defendant company on the other hand urge that the delivery order was not a document of title, that it was not negotiable, and that no goods passed. But to this the plaintiffs reply, (a) that this delivery order did pass by indorsement, (b) that the issue of the delivery order in the circumstances was a representation on which the plaintiffs acted, that the cash payable in respect of the goods to which it referred had been paid, and (c) that it is not open to the defendants to contend that the property in the goods had not passed or to place reliance on their not having passed if that was the fact.

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*First*, then, I will deal with the question whether these delivery orders pass by indorsement. It is to be noticed that the delivery order was in favour of Messrs. Janki Dass & Co.'s principals or order, so that the document itself points to its being transferable by indorsement.

But beyond this there is ample evidence that these delivery orders pass from hand to hand by indorsement, and that as Fletcher J., holds they are sold and dealt with in the market. On the other hand there is not a word in the evidence to support Mr. Zorab's argument that for their transfer a document of assignment is necessary. That the delivery order on which this suit is based was duly indorsed in the plaintiff's favour on the 4th of March has not been disputed.

I next have to consider whether the issue of the delivery order amounted to a representation that payment had been made to the defendant Company for the goods to which it related.

On this point we start with the emphatic evidence of the defendant Company's witness, Mr. Tyrel, which is recorded as follows:—

*Q.* There is not much tick credit in this trade on either side?

*A.* None whatever.

*Q.* You don't part with your documents without the cash and he wants his documents representing the goods before he pays?

*A.* Yes.

*Q.* These delivery orders are considered a good tender under a contract?

*A.* Oh, Yes.

*Q.* It is for the purpose of really making a tender that you make them out?

*A.* Yes, we send them round with a sircar as a rule.

I need not refer to the plaintiffs' evidence in detail; it will suffice to say that it fully supports the position that according to the invariable course of dealing in the Calcutta Jute Trade delivery orders are only issued on cash payment.

and that they are dealt with in the market as absolutely representing the goods to which they relate. This is borne out by the contract in this case which specifically provides that "payments are to be made in cash in exchange for delivery orders on sellers," and contain the stipulation "Ready payment against pucca delivery order." And in this connection it is worthy of notice that the delivery order in suit which is a pucca delivery order embodies the term "Ready shipment."

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Then we have the interview with Mr. Young, which I have already held to be proved.

An attempt has been made to minimise its effect, but it appears to me to be a matter of plain commonsense that, as between business men. Mr. Young's reply would be regarded as an assurance that the delivery orders could be safely dealt with in the ordinary course of business, and I have been in no way impressed with the analytical argument to which we have been subjected by counsel for the defendant Company on this point. Mr. Young could not have honestly replied as he did—and I absolutely decline to impute dishonesty to him—if he gave his reply with the mental reservation that if Luchminarain dealt with the delivery orders for value he might find he took nothing, because Janki Dass & Co. had not paid for the goods. And after all why should these delivery orders have been issued as they were, unless it was contemplated that Messrs. Janki Dass & Co., would at once deal with them for value either by way of sale or pledge? To this the defendant Company have vouchsafed no answer. Now here again I would for a moment recall the facts. These delivery orders bearing date the 2nd of March, were issued by the defendant Company to Janki Dass & Co., not later than the 3rd of March, and were on that day placed in Luchminarain's hands and shewn by him to Mr. Young. On the 4th after Luchminarain had promised to make an advance on them the defendant Company take a post-dated cheque from Janki Dass & Co., in respect of the three delivery orders including that in suit. Though this cheque is dated the 5th of March, it in fact was not paid until the 8th when it was dishonoured. In the mean-

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time the defendant Company had paid in on the 4th two post-dated cheques of the 3rd which they had received from Janki Dass & Co., in respect of other transactions. These were honoured, and it is admitted by the defendant Company as their Bank Pass-book makes plain that Rs. 15,000 odd of Rs. 18,000 advanced by the plaintiffs went towards the post-dated cheques so paid in.

Now there is not a word of explanation from the defendant Company's side as to why the delivery orders in suit should have been issued on the 3rd, or as to why these post-dated cheques were taken; it is obvious that the defendant Company have had the benefit of the money advanced by the plaintiffs, and, if their contention is to prevail, they will not only have had the benefit of his advance, but also of the goods on which the advance was made in consequence of their conduct. The bare fact that the plaintiffs' money has come to them may not have a direct bearing on the legal position, but it undoubtedly lends colour of probability to the contention that the delivery orders were handed over to Janki Dass & Co., to enable them to raise money on them, as in fact they did to the advantage of the defendant Company. And this gains the greater force from the fact that no one connected with the defendant Company has ventured into the witness box to explain how the delivery orders came to be issued on the 3rd., or why post-dated cheques were taken, or to repel the argument that they acted as they did to enable Janki Dass & Co. to raise money on the delivery orders, or to deny that the issue of delivery orders has the implication, and conveys to those engaged in this trade the assurance for which the plaintiffs contend. The conclusion then to which I come is that the defendant Company intentionally caused or permitted the plaintiffs to believe that the cash payable in respect of the goods to which the delivery order related had in fact been paid, and that the plaintiffs acted on that belief, and I therefore hold that the defendant Company cannot in this suit be allowed to deny that such cash was paid, and therefore they cannot claim to be entitled to a lien as against the plaintiffs. But



then it is argued for the defendant Company that the plaintiffs cannot succeed, as the property in the goods did not pass since there was no appropriation of them to this delivery order; and it is contended that no reliance can be placed on the 1st exception to section 108 of the Contract Act, inasmuch as, in the circumstances, the delivery order was not a document of title. It is difficult to see how the defendant Company can successfully rely on this plea in view of my conclusion as to the lien claimed by them; but, however, that may be, I think it must fail.

In India there is now statutory recognition of a delivery order as a document of title (see section 108 of the Contract Act and section 137 of the Transfer of Property Act) and under it the transferee acquires a title to the goods to which it relates.

It is, however, urged, that, in this case, it cannot be regarded as a document of title, seeing that the goods to which it relates were not ascertained. But in fact the defendant Company have adduced no evidence to prove that the goods had not been ascertained, though this was a fact specially within their knowledge (Section 106, Evidence Act). And apart from this the defendant Company can not be heard to advance this plea, and for substantially the same reasons as preclude them from showing cash was not paid.

They do not suggest that there were not goods applicable to the delivery order, they only say they have not been ascertained. But having regard to the terms of the delivery order, the known course of dealing in this market, Mr. Young's representation, and their own conduct, the defendant Company must be taken to have appropriated goods of the required quantity and description to this delivery order, and they cannot now be heard to deny that they held these goods for the plaintiffs. And it must be borne in mind that we have not to consider whether property passed as between the original sellers and buyers, but whether in the events that have happened, the sellers can assert this against the plaintiffs who have acted on the faith of the seller's representation that no lien exist

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ed and that they held goods to answer the delivery order. In my opinion the defendant Company's contention on this head must also fail, for in the circumstances, the defendant Company have represented that the delivery order would pass and confer a good title, and they put it in the power of Messrs. Janki Dass & Co., to indorse the delivery order with this representation to the plaintiffs, who, dealing in good faith and for value, were induced to alter their position on the faith of the representation so made. In these circumstances the defendant Company cannot be allowed to defeat the right which the plaintiffs have thus acquired: *Goodwin v. Roberts* (1). Nothing has been said against the amount of damages awarded by Fletcher J. and they must be accepted as correct. His decree, therefore, must be confirmed and this appeal dismissed with costs.

WOODROFFE J. I agree.

*Appeal dismissed.*

Attorneys for the appellant Company: *Sanderson & Co.*

Attorneys for the respondents: *Pugh & Co.*

(1) (1876) L. R. 1 A. C. 476.

J. C.

## APPELLATE CIVIL.

*Before Mr. Justice Brett and Mr. Justice Vincent.*

RAMDHARI SAHU

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July 28.

*Appeal—Private award—Civil Procedure Code (Act XIV of 1882), s. 525—Order rejecting application to file award made out of Court—Rules of Evidence.*

An appeal lies against an order refusing to grant an application to file an award made between the parties without intervention of the Court.

*Sheo Sahai Mahton v. Kirtarth Bhagat* (1) followed.

*Basant Lal v. Kunji Lal* (2) not followed.

Proceedings contemplated by s. 525 of the Code of Civil Procedure are proceedings of a private nature, to which the rules of evidence can not be strictly applied.

APPEAL by the petitioner, Ramdhari Sahu.

This appeal arose out of an application made by the plaintiff Ramdhari Sahu for filing an award under section 525 of the Civil Procedure Code. It appeared that the plaintiff and the defendant were brothers, and on the death of their father a dispute arose between them, and they tried to divide the properties amicably, but they failed in their attempt. On the 12th March, 1907, they jointly executed and registered a deed of agreement, by which they agreed to refer their disputes to five persons as arbitrators, who were also to effect a partition of the properties. On the 15th April, 1907, the award was delivered, and on 6th July, 1907, the present application was made to have the award filed in Court.

The defendant after taking several adjournments, on the 23rd of January, 1908, filed his petition of objection. The objections were that the arbitrators were guilty of partiality

\* Appeal from Original Decree, No. 569 of 1908, against the decree of Jogendra Nath Chuckerbutty, Subordinate Judge of Mozafferpore, dated Sept. 22, 1908.

(1) (1908) 7 C. L. J. 486.

(2) (1905) I. L. R. 28 All. 21.

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and misconduct, that the award was delivered after the arbitrators were served with notices not to proceed with the case, and that the division of the properties made was unfair.

The Court of first instance having found that the award was bad by reason of misconduct on the part of the arbitrators, and on the ground that the award was prepared after the arbitrators had been served by the defendant with a notice not to proceed with the arbitration, dismissed the application.

Against this decision the plaintiff appealed to the High Court.

*Moulvi Muhammad Mustafa Khan* for *Moulvi Zahadur Rahim Zahid*, on behalf of the respondent, took a preliminary objection that no appeal lay to the High Court against the decision of the Subordinate Judge: see *Basant Lal v. Kunji Lal* (1).

*Babu Joy Gopal Ghose*, for the appellant, relied upon the case of *Sheo Sahai Mahton v. Kirtarth Bhagat* (2), and contended that an appeal lay in the case. The facts found by the learned Subordinate Judge are not sufficient to hold that the arbitrators were guilty of misconduct or partiality. This being a private arbitration, the arbitrators were not bound to keep any record or to produce any record of the proceedings of the arbitration.

*Moulvi Mahammad Mustafa Khan*, for the respondent. The Court below was right in holding that the arbitrators were guilty of misconduct; and that notwithstanding the defendant gave them a notice not to proceed with the arbitration, they did so. This was clearly misconduct on the part of the arbitrators. The case of *Toolsimony Dassee v. Sudevi Dassee* (3) supports my contention.

BRETT AND VINCENT JJ. The plaintiff and the defendant who are the appellant and the respondent, respectively, in the present appeal are two brothers, and after the death of their father they seem to have quarrelled and to have made two or

(1) (1905) I. L. R. 28 All. 21. (2) (1908) 7 C. L. J. 486.

(3) (1899) 3 C. W. N. 361.

three ineffectual attempts to divide between them the property left by their father. Having failed, they on the 12th March, 1907, jointly executed and registered an *ekrarnama*, or deed of agreement, by which they agreed to refer their dispute to five persons as arbitrators, who were also to effect a partition between them of the property. On the 15th April, 1907, the award was delivered and, on the 6th July, 1907, the plaintiff-appellant applied to the Court under section 525 of the old Code of Civil Procedure to have the award filed in Court and a decree passed in accordance therewith. The written award appears to have been kept in the custody of one of the arbitrators and, in the application, there was a prayer that that arbitrator should be directed to produce the award in Court. This order was afterwards carried out. The application having been made on the 6th July, 1907, several adjournments were taken by the defendant, and on the 23rd January, 1908, he, for the first time, filed his petition of objection. In substance, his objections amounted to this—that the award was bad by reason of misconduct on the part of the arbitrators, it was illegal, and could not be enforced. He further stated, apparently as an instance of misconduct on the part of the arbitrators, that the valuation of the properties, had not been correctly made and that, in consequence, he had been prejudiced. The case was then adjourned on several occasions till the 13th July, 1908, and, a year after the first application had been made, an application was made by the defendant to the Court to appoint a Commissioner to value the properties in dispute. The plaintiff did not object to the application, and a Commissioner was appointed, and on the 10th August, 1908, the Commissioner submitted his report. After that, the Court examined the defendant and three witnesses on his behalf in order to support the allegation of misconduct against the arbitrators, and, in answer to that evidence, he examined on behalf of the plaintiff two of the gentlemen who had acted as arbitrators. On that evidence the learned Subordinate Judge arrived at the conclusion that the award was bad by reason of misconduct on the part of the arbitrators and on the ground that the award was prepared after the arbitrators

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had been served by the defendant with a notice not to proceed with the arbitration. The Subordinate Judge, therefore, dismissed the application and refused to allow the award to be filed. Against that decision the plaintiff has appealed. A preliminary objection has been taken that no appeal lies. In our opinion this objection cannot be sustained. In the case of *Sheo Sahai Mahton v. Kirtarth Bhagat* (1), which follows other decisions of this Court to the same effect, it has been distinctly held that an appeal lies against an order refusing to grant an application to file an award under section 525 of the old Code of Civil Procedure. It is true that a different view has been taken by the learned Judges of the Allahabad High Court in the case of *Basant Lal v. Kunji Lal* (2), but we are not prepared to differ from the view which has all along been taken by this Court, and which, in fact, has been introduced in the new Code of Civil Procedure as clause (f) of section 104. The preliminary objection, therefore, in our opinion, fails.

The learned Subordinate Judge in arriving at his conclusion that the arbitrators had been guilty of misconduct or partiality, as alleged by the defendant, relies entirely on the fact that certain statements made by the parties or statements made by the witnesses which were either filed before the arbitrators or were taken down by them in writing were not filed with the award in the Court and were not produced. The plaintiff when he made the application filed with it the award only and, so far as we can interpret the provisions of the law, that was all what was necessary under section 525 of the old Code. We are not aware of any provision of the law which requires persons to whom matters have been referred for decision by private arbitration to adopt any special procedure or which compels them to keep any record or to produce any record of the proceedings taken before them. The proceedings contemplated by section 525 are proceedings of a private nature, to which the rules of evidence cannot be strictly applied. It is not very clear from the evidence of the arbitrators themselves whether any formal record of the statements of

(1) (1908) 7 C. L. J. 486.

(2) (1905) I. L. R. 28 All. 21.



the parties or of the witnesses was made, but the arbitrators appear to have questioned the parties and the persons who were produced before them, in order to enable them to decide the questions which had been referred to them for determination. The learned Subordinate Judge in dealing with this question of misconduct appears to us to have travelled beyond that question, and to have really taken into consideration the merits of the award, and to have attempted to decide whether the decision of the arbitrators was one which, in his opinion, appeared to be correct. We think that it is no part of the duty of the Court acting under section 525, Civil Procedure Code, to enter into the merits of the award. All that section 526 contemplates is that the Court shall determine whether the defendant has made out against the award any objection which he is entitled to take under the provisions of section 520 or section 521 of the old Code. Thus the learned Subordinate Judge in dealing with this question of misconduct has attempted to decide whether the valuation made by the arbitrators of the properties was correct or not. We are not aware under what provision of law the learned Subordinate Judge appointed a Commissioner, in order to test the merits of the award or to determine whether the valuation was correct or not. But even if the report of the Commissioner on that matter be accepted, we think that a perusal of the whole report is sufficient to convince anybody looking into the matter impartially that, even supposing that, in the few cases where the Commissioner has differed from the valuation of the arbitrators, the arbitrators are in the wrong, there is no ground whatever for supposing that their mistake was not a *bonâ-fide* mistake but was a mistake due to collusion or misconduct. We may observe that so far as the valuation of the *Gola* house and of the orchard is concerned, we should certainly, in the position of the Subordinate Judge, have felt considerable hesitation in accepting the valuation of a learned member of the legal profession, acting as Commissioner, on those two matters in preference to the valuation arrived at by the arbitrators, in the case of the *Gola* house on the opinion of a

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mason, and in respect of the orchard on their own knowledge as persons living in the locality and holding orchards similar to the orchard which was the subject of consideration. In our opinion, the learned Subordinate Judge has not given in his judgment sufficient reasons to support the finding that the arbitrators were guilty of misconduct or partiality in preparing the award. He has next arrived at the conclusion that the arbitrators have shown partiality in the way they have divided the assets due to the joint family. It appears that the account books of the joint family were kept by the plaintiff, and that he produced them before the arbitrators. It seems from the evidence of the arbitrators themselves that certain objections were taken by the defendant to some of the items in the accounts, but that when he was asked to substantiate his objections, he failed to adduce any evidence whatever on the subject. The learned Subordinate Judge deals with one item in particular, which is a mortgage bond shown to be executed by Biju Goala in favour of the joint family. That bond is shown with accounts as still outstanding, and the bond itself appears to have been produced before the arbitrators by the plaintiff. It was admitted, however, that the joint family was in possession of the land covered by the mortgage, but it was explained that the bond which was a simple mortgage bond, having been treated as an usufructuary mortgage bond, the members of the joint family were allowed to remain in possession and to appropriate the profits in lieu of interest. The case of the defendant was that Biju Goala had executed a *kobala*, by which he had sold the mortgaged land to the family and so paid off the mortgage; but both the arbitrators in their evidence deposed that the defendant never made any such statement before them. The Subordinate Judge, however, has come to the conclusion that the defendant's story is correct, as the joint family of the plaintiff and the defendant was in possession of the mortgaged property. In our opinion, that conclusion is not warranted by the evidence or by the facts, and the circumstance that the bond was produced by the plaintiff certainly is inconsistent with

the view that Biju Goala had paid off the mortgage debt by transferring the property to the joint family or to the plaintiff. The arbitrators in their evidence have stated that the defendant failed to adduce any evidence in support of his allegation that the accounts produced by the plaintiff were not correct; and, though the arbitrators stated that there were some differences between the day-book and the ledger produced by the plaintiff, they appear to have found that the accounts were substantially correct, and that the assets which they divided among the parties were those due to the family.

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Before the arbitrators an objection was taken to another item, namely, a bond executed by Sheo Mistry on the ground that the sum due under the bond was not recoverable. The arbitrators, however, found that this objection was not well founded, as the value of the property mortgaged was more than sufficient to cover the mortgage debt. The learned Subordinate Judge in his judgment has not referred to this bond. The learned Judge has further held that from the award it appears that the defendant took objections on several other points, but that the arbitrators decided those points against him without giving him any opportunity to substantiate them. On these grounds the learned Subordinate Judge held that the arbitrators had been guilty of partiality and misconduct. The learned pleader, who has appeared to support the decision of the lower Court has contended that the learned Subordinate Judge was right in the view which he took with regard to the misconduct of the arbitrators, on the ground that they failed to give to the defendant a reasonable opportunity for the examination of his witnesses and because they arrived at no definite decision with regard to the objections raised, *first*, as to the jewellery, *secondly*, as to the accounts, *thirdly*, as to the landed property and, *fourthly*, as regards the debts. He has also contended that the award was bad for misconduct of the arbitrators, because they did not value the lands themselves and because they did not go into the question whether the plaintiff had named, as creditors to the estate, persons who were really fictitious creditors with the object of causing loss

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to the defendant. Four persons are referred to, who are entered in the award as creditors to the estate. They are Bunwari Lall, Lalji Sahu, Ram Lal Mali and Govind Sahu. It appears, however, that the debts due from the joint family have not been divided between the parties by the arbitrators, but have been left to be recovered from the members of the family jointly. It was not therefore necessary for the arbitrators to go into detail into these matters, as any decision with regard to these debts would certainly not bind the parties in any subsequent litigation. Furthermore, we can hardly regard this omission as sufficient to make out a case of misconduct on the part of the arbitrators.

Dealing with the other points raised by the learned pleader for the appellant, we are of opinion that the arbitrators did give the defendant a reasonable opportunity of producing witnesses to support his objections. It has been suggested that, when the defendant named certain persons as witnesses before the arbitrators, but did not produce them, the arbitrators ought to have taken steps to secure the attendance of those witnesses and to have examined them. We are not aware of any provisions of law which would enable the arbitrators to secure the attendance of persons before them for the purpose of giving evidence and we think that their duties cannot be taken to go further than to examine the persons produced before them by the parties to give evidence. It appears that the arbitrators sat for six or seven days for the purpose of dividing the properties which were not very numerous, and we think that there is no ground whatever for the contention that the defendant had not a reasonable opportunity of producing all his witnesses before the arbitrators. The defendant himself admits that he did not produce any witnesses before the arbitrators, with the exception of one only.

We have referred to the evidence given by the defendant before the lower Court, and we are unable to understand what objection he raised to the division of the jewellery. So far as his evidence goes, he appears to have been contented with the division which was made. In fact the division of the jewellery

appears to have been made between the two brothers without the assistance of the arbitrators at all.

As regards the accounts, we are of opinion that the arbitrators were justified in regarding the books filed by the plaintiff as entitled to reliance and in dividing the assets on the basis of those accounts.

As to the valuation of the lands, we find from the evidence of the defendant himself that no substantial objection to the valuation was taken, and we are unable to hold that the fact, that the arbitrators thought it necessary to go to the Mouzas to satisfy themselves as to the valuation, supports the conclusion at which the learned Subordinate Judge has arrived that there were disputes between the parties as to the valuation of the different properties. We are of opinion that the grounds on which the learned Subordinate Judge has arrived at the conclusion that the arbitrators are guilty of misconduct and partiality are unsound and, on the facts before us, there is nothing whatever to support the conclusion that the arbitrators in making the award acted otherwise than fairly and impartially.

The second point on which the learned Subordinate Judge has held that the award cannot be accepted is that the award was prepared after the arbitrators had been served by the defendant with a notice not to proceed with the work. Both the arbitrators have stated on oath that the award was signed and delivered on the 15th April, 1907, and the evidence adduced on behalf of the defendant to prove his attempt to serve the notice on the arbitrators is to the effect that the notice was not presented till the 16th April, 1907. The learned Judge has disbelieved the evidence of the arbitrators on this point simply on the assumption that they were strongly biased in favour of the plaintiff and against the defendant. In our opinion, there is no justification whatever for that conclusion, and we see no reason why the evidence, which stands un rebutted, of the two arbitrators who appear to be gentlemen of position in the village should not be accepted that the award was delivered before any notice whatever was issued by the de-

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pendant to the arbitrators to stay proceedings. It seems to us more likely that the defendant, having on the 15th April heard what the award was, went to his pleader, Dhirendra Babu, that day and had the notice written which was attempted to be served on the arbitrators on the 16th April. In our opinion, the second ground, on which the learned Subordinate Judge has held that the award cannot be accepted, fails.

It was also suggested that the award was bad because all the arbitrators had not sat together in disposing of the matter. The two arbitrators, however, themselves allege that all the arbitrators were present during all the sittings and there was only the evidence of the defendants to support the contrary contention. In our opinion we see no reason to hold that the evidence of the arbitrators on this point should not be accepted.

The result, therefore, is that we decree the appeal and set aside the judgment and decree of the lower Court and direct that the application of the plaintiff be granted, that the award be filed in Court, and that a decree in accordance with the same be drawn up. The plaintiff-appellant is entitled to recover his costs from the defendant both in this Court and in the lower Court.

*Appeal allowed.*

S. C. G.



## APPELLATE CIVIL.

*Before Mr. Justice Woodroffe and Mr. Justice Teunon.*

DURGA PRASAD SINGH

v.

RAM DOYAL CHAUDHURI.\*

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Aug. 10.

*Judgment—Personal knowledge of Judge—Materials not in evidence or improperly admitted as basis of judgment—Validity of such judgment.*

A judgment which is based on materials which were not in evidence and which have been improperly admitted or on the personal knowledge of the Judge, is not in accordance with law.

*Vallabha v. Madusudanan* (1) referred to.

SECOND APPEAL by the plaintiff, Durga Prasad Singh.

This appeal arose out of a suit to obtain *khās* possession of a village, on the allegation that the said village was included in the *zemindari* of the plaintiff and that the defendant was an ordinary temporary tenureholder who had refused to quit after due notice. The defence was that the defendant was one of several co-sharers in the tenancy, which was not an ordinary *ijara*, but a *jungleburi khudkati* tenancy, that the suit was bad for defect of parties and that no notices had been served and that the defendant was not liable to ejectment. The Subordinate Judge dismissed the suit. He found against the defendant on the points of defect of parties and want of notice, but on the merits he was of opinion that the defendant was not a tenant who was liable to be evicted. On appeal, the Judicial Commissioner agreed with the Subordinate Judge in his findings as to notice and defect of parties and in the conclusion. But in deciding the nature of the defendant's tenancy, the learned Judicial Commissioner,

\* Appeal from Appellate Decree, No. 889 of 1909, against the decree of W. H. Vincent, Judicial Commissioner of Chota Nagpur, dated Feb. 25, 1909, affirming the decree of Bepin Behari Chatterjee, Subordinate Judge of Purulia, dated March 31, 1908.

(1) (1889) I. L. R. 12 Mad. 495.

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imparted his personal knowledge on the question and consulted books which were not in evidence, and the parties had no opportunity of dealing with the matters therein mentioned. The plaintiff, being unsuccessful before the Judicial Commissioner, preferred this second appeal to the High Court.

*Dr. Rash Behary Ghose* (with him *Babu Lalitmohan Ghose*, for the appellant, referred to Phipson on Evidence, p. 351; section 57 of the Indian Evidence Act, and *Vallabha v. Madhusudan* (1). A Judge cannot impart his own knowledge nor can he rely on books, if the books were not admitted in evidence or inadmissible as such. The parties had no opportunity of dealing with the matter contained in the books.

*Babu Golap Chandra Sarkar Sastri* (with him *Babu Dwarkanath Mitra*), for the respondent. A Judge can always rely on text books, even if they are not admitted in evidence: see section 167 of the Indian Evidence Act.

WOODROFFE J. The main ground which has been argued in this appeal is that the judgment of the lower Appellate Court is wrong in law, inasmuch as it is based on materials which were not evidence and which have been improperly admitted. It is not necessary to go, with detail, into the various points on which the judgment of the learned Judicial Commissioner is attacked. It is sufficient to point out one or two instances which are the grounds for the order which I propose to make. It appears from the judgment itself that certain books which were described as text-books, namely, Robinson's Land Tenure Reports, Cotton's Memorandum of Land Tenures in Bengal and Webster's Report on the Land Tenure of Chota Nagpur, were referred to, and, (so far as I understand the judgment) relied on by the learned Judicial Commissioner. These books were referred to by him after the case was closed and the parties had no opportunity of dealing with the matters therein mentioned. Assuming (as to which I say nothing) that these reports would have been evidence; the

Judicial Commissioner states that he delayed giving judgment in the case, as he had been endeavouring to obtain books of acknowledged authority in relation to the Land Tenures which were the subject of discussion in the judgment until he could obtain them from Calcutta. I may refer in this connection to what was said in *Vallabha v. Madusudanan* (1).

Then in the judgment he refers to the Porahat settlement and to the Settlement Officer's report in connection with that settlement, though that settlement report was not in evidence or referred to by the parties.

Then, there are other matters which appear to have been relied upon, for which there is no evidence and in respect of which the learned Judicial Commissioner appears to have relied upon his own personal knowledge. It is stated, for instance in the judgment, "that in some cases it is believed that landlords have for some years been deliberately inducing ignorant tenants to sign documents describing themselves as temporary lessees, *ticadars* or *ijaradars*, with the object of evicting them from their hereditary tenancies when it is thought advisable." There appears to be no evidence in support of this statement. There are other passages upon which reliance has been placed in this connection.

I am of opinion, therefore, that the decree of the lower Appellate Court must be set aside and the case remanded to the Judicial Commissioner for a re-hearing in accordance with law and upon such evidence as the law allows.

The costs will abide the result of the hearing of the appeal on remand.

TEUNON J. I agree.

*Case remanded.*

S. M.

(1) (1889) I. L. R. 12 Mad. 495.

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## CRIMINAL REVISION.

*Before Mr. Justice D. Chatterjee and Mr. Justice Richardson.*

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 Aug. 26.

KALI PRASANNA BOSE

v.

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*Security for good behaviour—Evidence of acts committed several years before the proceedings—"Offences involving a breach of the peace"—Acts of high-handedness not accompanied with actual breaches of the peace—Liability of zemindar for acts of his naib and lathials committed in his interest—Abetment of offences involving a breach of the peace—Criminal Procedure Code (Act V of 1898) s. 110(e).*

Evidence of acts falling within the scope of s. 110 of the Criminal Procedure Code but committed several years before the date of the institution of the proceedings thereunder, is admissible.

*Wahid Ali Khan v. Emperor* (1) followed.

To bring a case within the section a person must be found to have habitually committed, attempted to commit, or abetted the commission of, offences of which a breach of the peace is an ingredient.

*Arun Samanta v. Emperor* (2) followed.

Where the only conviction against a zemindar was one under s. 150 of the Penal Code and there was evidence that he with his lathials (or his servants acting under his orders), took articles of food from bazar vendors, that he assembled lathials to enforce the performance of *puja* by his own *purohit*, threatened a witness with violence for deposing against him, and, with his lathials, uprooted some trees, cut the crops of his opponents, molested rival fishermen in boats and attempted to stop a marriage procession, but no breach of the peace was committed or complaint made by the opposite party:—

*Held*, that such acts did not involve a breach of the peace so as to support a charge of habitually committing offences within cl. (e).

But where the zemindar's naib had led several riots in his master's interest and had been convicted in several such cases, and there was evidence that certain lathials were always employed to help his cause:—

*Held*, that he had habitually abetted the commission of offences mentioned in that clause.

*Kasi Sundar Roy v. Emperor* (3) followed.

A Magistrate should be careful to see that s. 110 is not employed by private persons to wreak vengeance under the ægis of a Crown prosecution.

\* Criminal Revision, No. 692 of 1910, against the order of A. E. Stinton, Addl. District Magistrate of Dacca, dated March 16, 1910.

- (1) (1907) 11 C. W. N. 789.      (2) (1902) I. L. R. 30 Calc. 366.  
 (3) (1904) I. L. R. 31 Calc. 419.

ON the 24th May, 1909, Chinta Hari Dutt, Sub-inspector of Rajabari thana, submitted a report endorsed by Inspector K. P. Mookerjee to the Superintendent of Police, with a list or schedule of 64 cases in which the petitioners were said to have been implicated, and prayed for sanction to prosecute them under section 110 (e) and (f) of the Criminal Procedure Code. The report was ultimately forwarded to Babu G. C. Chatterjee, Sub-divisional Officer of Munshigunge, who, on the 7th June, instituted a proceeding under section 110 (e) and (f) which was withdrawn by Mr. Stinton, the Additional District Magistrate of Dacca, on the 10th. The petitioners were brothers belonging to the family of the Bahar Chowdhuries, and were muktears by profession. Kali Prasanna, the elder, resided mostly in Munshigunge having an extensive criminal practice there, while Kali Kumar resided at the family house in Bahar and managed the family properties. The trial began before Mr. Stinton on the 1st July 1909, and the prosecution closed on the 30th September. The petitioners filed a list of 152 defence witnesses on the latter date, and further lists on 31st January and 21st February 1910. The last one included the names of six witnesses, but the Magistrate refused to summon them. In the meantime the trial was, after several adjournments, resumed on the 16th February, and proceeded till the 7th March when an application was made to the Magistrate to examine the above six witnesses said to be present in Court, but he rejected it as they seemed to him to have been produced only for the purposes of delay. By his order, dated the 16th March, he directed each of the petitioners to execute a bond for Rs. 5,000, with five sureties in Rs. 1,000 each, to be of good behaviour for three years.

The Magistrate found that the petitioners mobilized a band of lathials, 52 of whom were named by the witnesses, under the leadership of their naib, Hemanta Sarkar, from their houses and kept them under arms on *churs* during disputes regarding possession thereof. He then stated that there were 38 cases against the accused and his men instituted between

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1902-1909, of which 35 were since 1906. He then enumerated the following cases with observations thereon:—

(1) *Ramjan Munshi v. Daimaddi Sardar and others*—Accused convicted, on 30th August, 1902, under ss. 147 and 379 I. P. C. The prosecution case was that they were Kali Prasanna's lathials.

(2) *Hasanullah Munshi v. Kali Kumar and others*—Charge under ss. 148 and 302 I. P. C. Kali Kumar was acquitted on 9th September, 1903, but it was established that the riot was committed by the petitioners' men and in their interests.

(3) *Jamini Kumar Sen v. Sabar Ali and others*—Accused convicted on 8th April, 1905, under s. 447 I. P. C. They were the petitioners' tenants and committed the offence in their interests.

(4) *Upendra Nath Banerjee v. Hemanta Sarkar and others*—Conviction on 31st August, 1906, under s. 144 I. P. C., committed in the interests of the petitioners.

(5) Twelve cases by *Arat Ali's tenants v. Hemanta and others*—Conviction on 24th May, 1907, under ss. 144 and 448 I. P. C. The tenants were evicted by a large force of Kali Prasanna's lathials led by Hemanta.

(6) *Emperor v. Kali Prasanna and Kali Kumar*—Conviction on 27th August, 1908, under s. 150 I. P. C. and fine of Rs. 1,000 upheld by the High Court.

(7) *Harish Banerjee v. Hemanta and others*—Conviction on 20th February, 1909, under ss. 144 and 379 I. P. C. The case arose out of a boundary dispute between Kali Prasanna and Abhoy Churn Mitter.

(8) *Babur Ali v. Hemanta and others*—instituted on 25th December, 1908, under ss. 147 and 379 I. P. C. Accused acquitted, but the Court found that the huts were removed by Kali Prasanna's men.

(9) *Haider Ali v. Jogessur Mookerjee*—instituted on 25th May, 1909, under ss. 144 and 380, but accused acquitted. Jogessur, an amla of Kali Prasanna, was said to have looted the huts of some refractory tenants with Kali's lathials.

Besides these there were a number of other cases, several of them pending at the time of the trial, arising out of recent incidents. The Magistrate took into consideration only those which he thought reasonably established, and grouped them as follows:—

(A) *Taking articles from shop-keepers and vendors without payment and by show of force.*

(i) At the Mela, on 1st Baisak last (14th April, 1909), in Bahar bazar, some lathials under Kali Kumar's orders forcibly took sweets and dried fish.

(ii) In the puja of 1908 some lathials under the orders of Kali Kumar took melons from a Mahomedan



(B) *Forcible dispossession of tenants and acts of mischief.*

(i) Mandar trees planted by Abhoy Mali were uprooted by Kali Kumar and four or five lathials. (January or February, 1909.)

(ii) Daggu Gazi was dispossessed by Kali Kumar and a large body of armed lathials who cut his paddy. (March 1909.)

(iii) Kali Kumar and lathials cut grass from the tank of Nayamuddi Molla on two occasions, the first, six or seven, and the other, three or four years, before the proceeding.

(iv) Alam Mirdha was dispossessed by Kali Kumar and lathials and his kalai cut. Case compromised last Baisak (March-April 1909) by the land being restored.

(v) Rajendra Chandra's tin hut was removed by Kali Kumar and twenty lathials from one end of the bazar to the other. Case compromised in 1908 by returning the hut.

(vi) Rash Behari Ghose was forcibly dispossessed for refusing to give kabuliats to Kali Prasanna. (March 1909.)

(vii) Lal Mohan Banikya's scaffolding was cut down by Kali Kumar himself. (July 1909.)

(viii) Hemanta and 20 lathials went to Hasail hat to take forcible possession of it by performing *bastoo puja*.

(C) *Obstruction of pathways and annoyance to Brahmins by settling Mahomedans near them.*

(i) and (ii) Kali Prasanna settled Nadia Bashi and Elahi Bux next to Naba Kumar Banerjee and Hari Charan Chuckerbutty out of enmity. (1908-1909.)

(iii) Village paths were closed by the erection of a hut or fences across, and guarded by Kali Kumar and lathials to prevent public passage. (April 1909.)

(D) *Acts of personal violence and threats.*

(i) Kulada Churn Chuckerbutty had his eyebrow, moustache and head shaved at the orders of Kali Kumar, who was present with lathials assembled in a hut to enforce the performance of the *Charak puja* by his own *purohit*. (13th April, 1909.)

(ii) Kamini Kumar Ghose was assaulted by Kamini, brother of the petitioners and their lathials. (28th April, 1909.) Attack on Taranath's house on the same day by Kali Kumar and lathials (28th April, 1909.)

(iii) Ananda Mohun Koiberto was summoned by Kali Prasanna and compelled to lend money without interest on threat of confinement (5 or 6 years before). Hemanta demanded a further loan in the interest of Kali Prasanna. (May 1908.)

(iv) Jogendra Ghatak and Kunja Pal were threatened by Kali Kumar with violence for deposing in cases against him. (January and May 1909.)

(E) *Looting fish in river boats.*

(i) Kali Kumar with Hemanta and 15 lathials went in boats, looted fish and money from Ananda Mondul Koiberto and other rival fisher-

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men owing to a julkur dispute with the latter's lessor. (August 1908.) Ananda complained to Kali Prasanna, who said they would go on oppressing him. Petitioners' tehsildars and 20 armed lathials looted fish and money from Sonatun Mundul and others. (February 1909.)

(ii) Hemanta and lathials similarly looted fish from Raj Mohun Koiberto two or three years before.

(F) *Stoppage of marriage processions.*

(i) Kamini and lathials blocked the passage along which the marriage procession of Abhoy Pal was to pass. (May 1909.)

(ii) Kali Kumar assembled a large force of lathials to obstruct the marriage procession of Pran Bose.

The Magistrate found that the case was clear against Kali Kumar of habitually committing offences involving a breach of the peace under clause (e) and of being desperate and dangerous character within clause (f). As to Kali Prasanna he held that there was good reason for believing that the policy of the petitioners was controlled by him, that he was the brain and Kali Kumar the hand, that he was the *karta* and in joint-mess with his brother, that he was a leading muktear and a man of commanding ability and force of character compared to whom Kali Kumar was a cypher, and that he had taken a personal part in many incidents, *e.g.*, he prepared to take forcible possession of Nakkata *chur*, demanded contributions from co-sharers for the costs of the rioting and murder case arising in connection with it, suggested the capture of Hasail *hât*, settled Mahomedans close to Brahmins, threatened Naba Kumar with force for not settling a share of his *taluki* right with him, demanded contribution from Ananda Mondal and personally settled the julkur of a *done* of the Padma. He was of opinion that a case of habitually abetting the commission of offences involving a breach of the peace was established against him. By his order, dated the 16th March, he directed each of the petitioners to execute a bond for Rs. 5,000, with five sureties in the sum of Rs. 1,000 each, to be of good behaviour for 3 years. The petitioners executed the bonds with the sureties, and moved the High Court and obtained the present Rule on the grounds stated in its judgment.

*Mr. P. L. Roy* (with him *Babu Dasharathi Sanyal, Babu Surendra Nath Guha, Babu Suresh Chunder Mookerjee* and

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*Babu Ganoda Churn Sen*), for the petitioners. The accused belong to the wealthy and respectable family of the Bahar Chowdhries. Kali Prasanna is a leading muktear of Munshi gunge where he resides with his family and enjoys a large practice in the Criminal Courts. Kali Kumar is also a muktear, but lives in Bahar and manages their properties there. The Magistrate has found that the evidence in the case is mainly that of members of the same family who are at loggerheads with the petitioners, supported by Abhoy Churn Mitter, with whom they have special enmity on account of *chur* disputes. The local police officers, and especially Chinta Hari Dutt, Sub-inspector, and Inspector Kalipada Mookerjee, espoused the cause of the petitioners' enemies and got up this case with their assistance. On the 27th February, 1910, Kali Prasanna complained to Mr. Webb, the District Superintendent of Police, that the police had combined with his opponents and were trying to oppress him, and he repeated his charges in a written petition dated the 9th March. The prosecution evidence is tainted with personal enmity whereas, on the other hand, a large number of respectable persons of all classes and professions in Munshigunge have given him a good character. The Magistrate has given the go-by to this evidence. As to the first ground of the Rule, it is clear that the Magistrate has relied on matters which occurred many years ago. The police report mentions 64 cases, but they include cases brought by the petitioners and his men. Out of the 38 cases referred to by the Magistrate 12 relate to the same transaction. [He then analysed the cases and continued.] There is nothing in the judgments of the cases numbered (i), (ii) and (iii) by the Magistrate to support his view that the offences specified therein were committed in the interests of the petitioners. In the eighth and ninth cases Kali Prasanna's men were acquitted. Then as to the second ground there is only one conviction against the petitioners, *viz.*, under section 150 of the Penal Code. The offences under section 144, 379, 380, 448 referred to in these cases are not "*offences involving a breach of the peace*" which expression means offences in which the com-

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mission of a breach of the peace is an ingredient: *Arun Samanta v. Emperor* (1). [He next commented on the acts referred to by the Magistrate under A to F.] These acts do not come within the above ruling. There was no actual breach of the peace and no complaint was made by any of the persons concerned.

*Mr. Monnier*, for the Crown. The first ground of the Rule is not tenable. Habit is constituted by an aggregate of acts: *Re Shriram Venkatasami* (2), and hence the commission of offences in the past is involved in the terms "*habitual robber*," etc.: see *Queen-Empress v. Sherkhani* (3). Evidence of acts committed several years ago is admissible to show the formation of the habit: *Wahid Ali Khan v. Emperor* (4). In *Kasi Sundar Roy v. Emperor* (5), evidence of acts indicating a systematic course of misconduct during five years before the institution of the proceedings was held admissible. No doubt recent acts must be established to show continuance of the habit when it is not proved by repute. The Magistrate here relied only on three cases occurring between 1902—1906 and on 35 cases since, of which, he says, ten were instituted within nine months of the date of the proceeding. As to the second ground on which the Rule was issued, actual complaint and prosecution are not necessary to support an order under section 118 of the Code: *Wahid Ali Khan v. Emperor* (4). The section is not confined to cases where positive evidence of crime is forthcoming: *In re Pedda Siva Reddi* (6), nor is proof of previous conviction required: *Queen-Empress v. Sherkhani* (3), followed in 2 *Bom. Law Rep.* 57. Evidence of repute is sufficient without even proof of specific instances: *Emperor v. Shahukha Mahibukha* (7). The expression "*offences involving a breach of the peace*" is not limited to offences in the legal definition of which actual commission of such breach is an ingredient, but includes acts which are in

(1) (1902) I. L. R. 30 Calc. 366.

(4) (1907) 11 C. W. N. 789.

(2) (1871) 6 Mad. H. C. R. 120.

(5) (1904) I. L. R. 31 Calc. 419,

(3) (1893) Ratan. Unrep. Cr. Ca.

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639, 642.

(6) (1881) I. L. R. 3 Mad. 238.

(7) (1907) 9 *Bom. Law Rep.* 164.

their nature indicative of an intent to commit a breach of the peace. The public peace can be broken by angry words as well as by acts: *King-Emperor v. Chunibhai Dahyabhai* (1). Threats of violence indicate such an intent: see *Surjya Kanta Roy Chowdhury v. Emperor* (2). The case of *Arun Samanta v. Emperor* (3), referred to by Mr. Roy is not quite consistent with the later case of *Kasi Sundar Roy v. Emperor* (4), and is distinguishable as the acts alleged there did not indicate an intention to *commit* a breach of the peace on the part of the accused himself, but were *provocative* of a breach of the peace by others against him. This distinction is clearly brought out in *Re Kunhipura Parambil* (5). Even under section 106 it has been held that, though a conviction under section 143 of the Penal Code is not of itself sufficient for an order thereunder, yet, if the offence is committed under circumstances of force or violence showing an intention to commit a breach of the peace, the party may be bound down: *Jib Lal Gir v. Jogmohan Gir* (6), *Sheo Dhajan Singh v. Mosawi* (7). So held also in cases of convictions under section 144 [*Srihari Shome v. Lal Khan* (8), *Bepin Behari Guha v. Pranakul Majumdar* (9)], section 379 [*Chandra Bhuiyan Sen v. Emperor* (10), *Kishore Sirkar v. King-Emperor* (11)] and section 448 of the Penal Code [*Tarini Charn Mundle v. Gourikant Biswas* (12)]. The offences under ss. 144, 379, 380 and 448 committed in the circumstances of the cases numbered (3) to (5), (7) and (9) in the trying Magistrate's judgment are offences involving a breach of the peace; there being armed lathials employed in each case. The acts designated *A* to *F* by him resolve themselves into theft with violence (*A*), rioting and mischief (*B*) or wrongful restraint (*C* and *F*), assault or criminal intimidation (*D*) and river dacoity (*E*), and also

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| (1) (1902) 4 Bom. Law Rep. 78.         | (6) (1899) I. L. R. 26 Calc. 576. |
| (2) (1904) I. L. R. 31 Calc. 350, 356. | (7) (1900) I. L. R. 27 Calc. 983. |
| (3) (1902) I. L. R. 30 Calc. 366.      | (8) (1900) 5 C. W. N. 250.        |
| (4) (1904) I. L. R. 31 Calc. 419, 422. | (9) (1906) 11 C. W. N. 176.       |
| (5) (1883) 2 Weir 47.                  | (10) (1907) 7 C. L. J. 172.       |
|                                        | (11) (1903) 8 C. W. N. 517.       |
|                                        | (12) (1902) 7 C. W. N. 25.        |

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fall within the scope of section 110 (e). Taking the evidence against each of the petitioners separately I submit that the findings of the Magistrate against Kali Prasanna show that the acts of Kali Kumar, the naib Hemanta and of the lathials were committed in the joint interests of both the petitioners with the advice, or at least, the connivance of Kali Prasanna. A zemindar is liable as an abettor within section 110 (e) for acts of oppression committed in his interest by his naib and lathials and under his orders or with his connivance: *Kasi Sundar Roy v. Emperor* (1). The same principle has been laid down in s. 107 cases in *Surjya Kant Roy Chowdhry v. Emperor* (2) and *Srikanta Nath Shaha v. Emperor* (3). The evidence against Kali Kumar establishing at least abetment consists, as in the case of Kali Prasanna, of the acts of the naib and lathials and in the numerous instances of misconduct detailed in A to F. There is no substance in the third ground of the Rule. The six witnesses were not named between the 30th September 1909, and the 21st February 1910. The application of the 7th March was not *bonâ fide*, and the Magistrate rightly rejected it: *Wahid Ali Khan v. Emperor* (4).

*Babu Dasharathi Sanyal*, in reply, commented on the evidence relating to the cases and instances mentioned in the Magistrate's judgment.

CHATTERJEE J. The petitioners in this case are two brothers. They admittedly belong to a most respectable family of zemindars, the Bose Chowdhries of Bahar. They are both legal practitioners, the elder, Kali Prasanna, having extensive criminal practice at Munshigunge where he mostly resides, the younger, Kali Kumar, mostly living at Bahar in the family residence, and looking after the family properties. The Bahar family has now split up by successive partitions and the several branches have been admittedly at loggerheads. The members of several branches have made a common cause against the accused and supported the prosecution

(1) 1904) I. L. R. 31 Calc. 419.      (3) (1905) 9 C. W. N. 898.  
 (2) (1904) I. L. R. 31 Calc. 350.      (4) (1907) 11 C. W. N. 789, 793.



by their evidence. The petitioners had special enmity with Rai Abhoy Churn Mitter Bahadur, a retired military contractor of great wealth, and the learned Magistrate says "the struggle with Rai Abhoy Mitter Bahadur over the *chur* lands has been long and bitter, and the Rai Bahadur's influence is plainly visible in the present case. The police officers, especially Chinta Hari Dutt, Sub-inspector of Rajabari thana, from March 1906 till June 1909, and Inspector Kalipada Mookerjee have generally espoused the Rai Bahadur's side." It is clear, therefore, on the finding of the learned Magistrate himself, that this public prosecution has been supported by persons more or less interested in the downfall and humiliation of the petitioners. It is notorious that accusations under this section are constantly made with the object of blackening an enemy's character and of satisfying feelings of spite and hatred, and the Magistrate cannot be too cautious in making sure that provisions intended for securing the peace of the community are not utilized for wreaking private vengeance under the ægis of a Crown prosecution.

It appears that on the 27th of February 1909 the petitioner, Kali Prasanna, saw the District Superintendent of Police, Mr. Webb; and complained to him that the local police officers had combined with his enemies and were trying to humiliate him in various ways. He was directed to make a written representation, and he did this by a petition dated the 9th March 1909. The Sub-inspector, Babu Chinta Hari, on the 24th of May, 1909 made a report endorsed by the Inspector, Babu Kali Prasanna Mookerjee, that the petitioners were "men of irritative and desperate character, and have an earnest desire of increasing their landed property by force. Whenever any land is accreted in any place, in or near any mouza in which they have got some share, they always come forward with a claim to it, whether valid or not, and try to get the whole of it into their possession by driving out any person who might have taken possession of it beforehand by means of criminal force; in short they cannot remain in peace without quarreling with their equals and oppressing the weaker

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ones." On this report there is hardly any element of section 110 of the Criminal Procedure Code. However, the police mentioned a large number of cases in which the accused are said to have been implicated, and asked for a proceeding under section 110 clauses (e) and (f), and such a proceeding was in fact initiated against them, and they have been bound down for three years in heavy recognizances and sureties. They have furnished the security and given the required bonds, and they obtained this Rule on three grounds; (i) that the Magistrate has relied on matters occurring many years ago, (ii) that the petitioners have not been convicted of or charged with any offence involving a breach of the peace, (iii) that the Magistrate has refused to examine certain witnesses tendered for examination.

On the first ground the learned Magistrate has no doubt referred to one case of 1902, one of 1903 and one of 1905; but it cannot be said that these cases were not admissible in evidence: see *Wahid Ali Khan v. Emperor* (1), and if that be so the order of the Court below cannot be impeached on that ground.

On the second ground reliance is placed on the case of *Arun Samanta v. Emperor* (2), in which it was held that "offences involving a breach of the peace" mean offences of which a breach of the peace is an ingredient. The petitioners must be found to have habitually committed, attempted to commit or abetted the commitment of such offences. As regards Kali Prasanna it may be stated at the outset that there is no such evidence. He generally lives at Munshigunge, has a very large criminal practice there, and a very large number of respectable people of Munshigunge have deposed to his good character. If he was habitually of such a bad character as the prosecution want to make out, why was he not prosecuted until he made specific charges of misconduct against the police? He was convicted only once in 1908 under section 150 of the Indian Penal Code and had his due punishment. If he were considered dangerous to the peace of the

(1) (1907) 11 C. W. N. 789.

(2) (1902) I. L. R. 30 Calc. 386.

community he might have been bound down under section 106 in that case, but he was not, and it is not shewn that he has become dangerous since. The order of the lower Court, so far as it affects him, must be set aside.

As regards Kali Kumar the evidence is of the following cases:—

A (i). Three of his servants Mohon, Elahi and Chanda took sweets in the Bahar bazar under his orders without paying for them. He with his lathials took fish from certain vendors in the Bahar bazar.

A (ii). His men Chanda and Akimuddi took melons from a Mahomedan woman.

B (i). He with some lathials uprooted some trees planted by Abhoy Mali.

B (iv). He with his men cut some kalai from another man's land and thus dispossessed him; he complained and the land had to be given back.

D (i). Kali Kumar assembled his lathials in a hut near the *Charak puja* for enforcing the performance of the *puja* by his own *purohit*.

D (iv). Kali Kumar threatened Jogendra Ghatak with violence if he deposed in favour of Hari Charan Chuckerbutty.

E (i). On several occasions Kali Kumar with his lathials in boats molested Ananda Mandal.

F (ii). He attempted to stop a marriage procession with a large number of lathials.

Other cases are named in which other people took the assistance of his lathials to fight their own battles.

No breach of the peace, however, is said to have been committed, and the parties molested never sought redress for any breach of the peace committed by him. These, therefore, cannot be said to involve a breach of the peace so that it could be said that he had habitually committed offences within the mischief of clause (e). His only conviction is one under section 150 of the Indian Penal Code in 1908, but that would not constitute habit. But has he habitually abetted the commitment of such offences? The story that he kept a paid

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body of lathials at his house at Bahar and another body at his *cutcherry* has been disbelieved, and the Magistrate thinks the lathials are mobilized on occasions for his fighting work. In the case of *Kasi Sundar Roy v. Emperor* (1), it was held that a zemindar employing lathials to threaten his tenants and use force by unyoking their bullocks, and burning their houses for the purpose of compelling the tenants to pay enhanced rents, brought himself within the mischief of clause (c). In the present case his naib, Hemanta, is found to have led several riots in his interest and been convicted in several cases. There is evidence that certain lathials are always employed to help his cause. The materials seem sufficient to bring him within the mischief of clause (c) as interpreted in the case of *Kasi Sundar Roy v. Emperor* (1). The order as regards Kali Kumar, therefore, must stand, and the Rule must be discharged as regards him and made absolute as regards Kali Prasanna.

RICHARDSON J. I concur in the orders proposed by my learned brother. The cases of the two men against whom the proceedings were taken stand on a very different footing. The complicity of Kali Prasanna in the transactions on which the proceedings are founded has not in my opinion been brought home to him. In regard to Kali Kumar, however, there is, I think, ample evidence on the record to justify the taking of security from him.

E. H. M.

(1) (1904) I. L. R. 31 Calc. 419.

## SPECIAL BENCH.

Before Mr. Justice Harington, Mr. Justice Holmwood and  
Mr. Justice Doss.

EMPEROR

v.

ABANI BHUSHAN CHUCKERBUTTY.\*

1910

Aug. 30.

*Conspiracy to wage war—Confession of conspirator made to a Magistrate after arrest—Admissibility of the confession against a co-conspirator jointly tried with him—Evidentiary value of such confession—Evidence Act (I of 1872) ss. 10, 30—Penal Code (Act XLV of 1860) s. 121 A.*

A confession by a conspirator made to a Magistrate after arrest disclosing the existence of a conspiracy, its objects and the names of its members, is not admissible, under s. 10 of the Evidence Act, against the co-conspirators jointly tried with him, but only under s. 30 of the Act.

Section 10 is intended to make as evidence communications between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy. The confession of a co-accused was not intended to be put on the same footing as a communication passing between conspirators or between conspirators and other persons with reference to the conspiracy.

The evidentiary value of such a confession, under s. 30, is not higher than that of the statement of an accomplice, and it cannot be acted upon unless corroborated by independent testimony implicating the accused in the design with which they are charged.

THE accused, Abani Bhushan Chuckerbutty and 12 others, were tried at a session of the Special Bench constituted under s. 11 of Act XIV of 1908, and held on the 18th and subsequent dates in July and August 1910, on a charge under s. 121A of the Penal Code.

The case for the prosecution was that the accused were members of a criminal conspiracy the object of which was to effect a revolution and to deprive the King of the sovereignty of British India by violence and force of arms. The methods by which the conspirators were to attain their end were the organization of bands of youths trained to physical exercises

\* Trial by a Special Bench constituted under Act XIV of 1908.

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for the purpose of actively disseminating the propaganda of revolution, the inflaming of the minds of peaceful and contented persons by seditious writings, songs and speeches, and the collection of funds, among other ways, by dacoity.

The accused Abani was arrested on the 2nd September 1909 in connection with a dacoity committed at Bighati, and confined in the Hooghly jail. While there he was visited by Superintendent Shamsul Alum on the 12th, and by Mr. Denman, an officer of the Criminal Investigation Department, on the 13th. In consequence of a communication from Mr. Denman on the 13th, the District Magistrate of Hooghly deputed Babu Kumud Nath Mookerjee to go to the jail and record the confession of the prisoner which he did. In his confession Abani gave information regarding a number of attempted dacoities, and admitted the existence of an organized association of a number of persons named, including eight of the present accused, to commit dacoities in order to collect money for the purchase of arms and ammunitions to be used against the Government. A day or two after he was taken out by another Magistrate to have the confession verified, and he went to the places mentioned therein and pointed out the scenes of the different incidents referred to therein. On the 30th October, the District Magistrate of Khulna tendered him a pardon, and he was examined as a prosecution witness on the same and the next day during the preliminary inquiry into the Nangla dacoity case, and repeated the statements embodied in his confession. He also deposed similarly in December in certain cases tried under s. 400 of the Penal Code, but resiled from the confession and the deposition before the committing Magistrate at the trial of the accused before a Special Bench of the High Court in respect of the Nangla dacoity, alleging that he had been tutored to make them by Shamsul Alum. The pardon granted him was revoked, and he was committed to the High Court on the original charge of dacoity and convicted and sentenced in respect thereof: *vide Emperor v. Abani Bhushan Chuckerbutty* (1).



*The Advocate General (Mr. Kenrick, K. C.), Mr. E. P. Whose and Mr. Bagram, for the Crown.*

*Mr. J. N. Roy and Mr. N. C. Sen, for the prisoners.*

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HARINGTON, HOLMWOOD AND DOSS JJ. The prisoners in this case stand charged with offences under section 121 A of the Indian Penal Code. It is the case for the Crown that there exists a wide-spread conspiracy to effect a revolution by violence and by force of arms to deprive the King of the sovereignty of British India. The allegation is that the thirteen persons who now stand in the dock are participators in that conspiracy; and to justify the inference that the conspiracy exists and that the persons, who have been placed upon their trial before us, are engaged in that conspiracy, the Crown relies upon certain facts. The first important fact on which the Crown relies is that there was found in the possession of some of the prisoners a trunk containing documents advocating revolution by violence, describing how secret societies to that end should be organized and the lines on which they should carry out their operations, how high explosives were to be manufactured and how, when prepared, they could most readily be employed for the purpose of murder and the destruction of property.

All the prisoners, it is said, were in close association with those in whose possession those documents were found, and with each other, and they were found to be pursuing the line of action laid down in the documents which were discovered in their possession. For example, the minds of persons peaceful and contented were to be inflamed by seditious writings, by songs and by speeches and such methods; and from the prisoners, it is alleged, emanated seditious writings, seditious speeches and seditious poetry, directed to the end laid down in the documents found in their possession. Further, bands of men were to be organized for the purpose of actively propagating doctrines of revolution, and these bands were to be trained to warlike exercises, and to undergo physical drill and instruction in the use of weapons. It is said that the prisoners were parties to the organization of, or were mem-

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bers of, such bands, and that amongst these bands seditious speeches were made, and the youth of the country who were attracted to them were trained in physical exercise (*lathi play*) with intent that they should be able to take their part in the revolution by force, which it was intended, at some future time, to bring about. Funds were to be collected for the purpose of propagating the doctrine of the conspirators and for the collection of arms and ammunition. These funds were to be collected by the associations, or were to be obtained by means of robberies committed on the peaceable inhabitants of the country. It is alleged that the prisoners were parties to various robberies or attempts to rob, and, lastly, the Crown relies upon the fact that the correspondence and documents found in the possession of the various prisoners disclose that they were engaged in some secret design which they were unable to express openly. And it is contended that the literature in the possession of the prisoners and the acts done by them point to one conclusion, and that is, that they were parties to the design which is charged against them in the indictment.

Now with regard to the evidence which has been placed before us, the first piece of evidence to which we think it right to refer is the statement of one of the accused persons, namely, Abani. This man was arrested on the 2nd of September; and on the 13th of September, he made a statement to a Magistrate named Kumud Nath Mookerjee. In that statement he implicated himself and a large number of persons in the conspiracy which is charged against the prisoners; and out of the number that he implicated eight of the persons who now stand in the dock were included. Later, in company with another Magistrate, he went to the various places he had referred to in his statement and pointed out the scenes of the different incidents to which he referred, and, later still, before the Magistrate he made depositions against his co-accused in certain proceedings which were instituted against them under sections 400 and 395 of the of the Indian Penal Code. While in jail he held surreptitious communications with another person who was in jail,

a man named Lalit, and intimated in those communications that he intended to withdraw what he said when he was called as a witness in the trial of the persons against whom he had made depositions before the Magistrate. In fact when called as a witness he retracted the statements he had made, and suggested that what he had said had been taught him by the late Shamsul Alum. Now Shamsul Alum was murdered on the 24th of January. The communication which Abani held with Lalit was in February, and it is a very striking and significant fact that in the communication with his friend Lalit there is no suggestion that the late Inspector taught him anything. That appears to us to be a pure afterthought, and the suggestion is made by Abani because the man against whom it is made cannot be called to contradict it. It is clear to us that the statement made by Abani in the presence of the Magistrate, Kumud Nath Mookerjee, was a perfectly voluntary statement, and that, with the statement made before the other Magistrate and the deposition, it can be regarded, at any rate, as evidence against Abani himself. That is the first part of the evidence on which the Crown relies.

Another piece of evidence, to our minds the most important piece of evidence in the case, is the discovery of the documents in the possession of the principal persons amongst the accused. Now these documents were discovered at No. 15, Jorabagan Street, on the occasion of the search made in the room there occupied by Bidhu, Aswini and Brojendra on the 2nd of September. In the trunk which was then found were documents which, in the ordinary course of things, would have been the property of the different persons who were found together in that room. The trunk was locked. The key was in a tin box and was pointed out to the search party by Aswini. When the trunk was unlocked there were found in it, amongst a great number of papers, two sets of documents which are of the first importance, one, a set of three small paper books entitled *Mukti kon pathe*, and the other, a set of documents which may be described shortly as the confidential exhibits. Now the *Mukti kon pathe*

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consisted of a reprint of articles originally published in a seditious newspaper called the "*Jugantar*." These articles, amongst other matters, in supporting the view that there should be a revolution, point out that the revolution is to be prepared for in two definite stages. One of these is the formation of public opinion, and the other, to use the words of the writers, "by brute force and the collection of arms." The *Mukti kon pathe* goes on to show how public opinion is to be formed, and it recommends publications in newspapers, music, literature, preaching, the formation of secret meetings and secret associations. The second branch of the preparation for revolution, namely, brute force and collection of arms, is also dealt with, and the paper sets out that the arms must be collected being purchased with money obtained to that end by robbery: further, that bombs should be prepared and that the attention of the youth of the country should be directed to the attainment of physical strength for the coming struggle. That, very briefly, is the more important portion of the *Mukti kon pathe*.

Then there are the other documents to which we have referred as the confidential exhibits. In these exhibits are to be found the details as to the organization of secret societies. There are to be found instructions as to how high explosives and bombs are to be manufactured, and these instructions are illustrated with beautifully executed pencil drawings, which must have been made by draughtsmen of very considerable skill. There is no evidence as to when the *Mukti kon pathe* was published, but the confidential exhibits contain internal evidence that a portion of them, at least, has come into existence since April 1908. In that month an attempt was made to murder the Mayor and Mayoress of Chandernagore by throwing a bomb into the room in which they were sitting. Mercifully it failed to explode. A reference in one of the confidential documents to this abortive attempt to murder, and a discussion as to the reason why the bomb did not explode, establish clearly that that particular document must have come into existence since that attempt was made. Now these were the most important of the documents found in the pos-

session of the prisoners at Jorabagan Street, and on the occasion of the search the documents, when found, were signed by the prisoner Bidhu who explained that he took the precaution to guard against any documents being subsequently interpolated by evil-minded persons. To meet the difficulty which the accused find themselves in by the production of those extremely incriminating documents, it was argued by the defence that what we have described as the confidential exhibits were brought to No. 15, Jorabagan Street, on the day previous to the search by a person named Jogi Rai. It was suggested that Jogi Rai was a police spy, and, though I do not think it was stated in express terms, the insinuation was that those documents were put in there by the police spy for the purpose of getting the prisoners into trouble. Now it becomes necessary to examine carefully the evidence as to what took place at the search to see if there was any foundation for such a suggestion or not; and, before dealing with that evidence, one is bound to make the observation that the confidential exhibits in a very remarkable way form what may be called the complement to what is to be found in the *Mukti kon pathe*. The *Mukti kon pathe* advises in general terms the organization of bands. The confidential exhibits give the details of the manner in which those bands were to be organized. The *Mukti kon pathe* recommends bombs. The confidential exhibits show how those bombs were to be manufactured; and, in short, the confidential exhibits would enable those who studied them to carry out the directions which are to be found in general terms in the *Mukti kon pathe*. Now to establish the suggestion that these documents were something separate from those which belonged to the prisoners, it was first sought to make out that they were tied up together in a bundle by themselves. Out of the three witnesses the two officers engaged in the search were cross-examined on this point, and they were both confident that these documents were not tied up in a separate bundle. The third person present, that is, the independent witness, was not asked any question on this point. Then, if it were true that these documents contained matters unknown to the prisoners and had

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been brought by another man the night before, one would have expected a statement to that effect to be made at the time. No such statement appears to have been made, and moreover, if it had been desired to preserve evidence of such a statement, it was within the power of Bidhu to have recorded it. He was supplied with pen and ink, he affixed his name to each document as it was produced from the trunk. It is impossible to believe that, if these documents stood apart from the other papers found in this trunk, Bidhu would not have made some endorsement to that effect upon them. But, as it is, they are treated in precisely the same way as all the other documents found in the trunk. Moreover, it is significant, with regard to the prisoner's knowledge of the contents, that in some of the documents, namely, those giving illustrations of the bombs, the signature appears in close juxtaposition to the pictures and descriptions found in that document. Further, there is no evidence at all that Jogi Rai or any stranger came to this room on the day before the search; and it appears that the first time that it was suggested that these documents had been brought by Jogi Rai was in the statement made by Bidhu on the 8th of September, that is, six days after the search. Taking all these facts into consideration and especially in view of the fact that the documents were treated by Bidhu just as the other documents found in the trunk, we have no hesitation in coming to the conclusion that the discovery of the documents was a perfectly genuine one, and that these documents were, like the other papers in the steel trunk, in the joint possession of the prisoners, who were in occupation of No. 15, Jorabagan Street.

The next branch of the case which it is necessary to refer to is the evidence of association. It is unnecessary at this stage to discuss that evidence. It consists in letters found in possession of the different prisoners, in a diary found at the house of Bidhu and in a mass of oral evidence. But it is unnecessary to discuss it because no serious attempt has been made by the defence to deny that these persons were, in fact, in association as alleged by the Crown. But what the defence says is that the prisoners, Kalidas and Nagendra, are uncle and



nephew, that Mohini and Aswini are brothers-in-law, that the two Nagens, Kali Dass and Mohini, are all inhabitants of Solepur and that Sudhir and Aswini are fellow villagers; and it is pointed out that, with the exception of Kumira and Dacca, all the villages from which the prisoners come are within moderate distances from each other. It is contended that from these facts it is to be inferred that the association was a natural and innocent association of persons who come from the same part of the country and are, in some cases, related to one another. Now the statement of Abani, the possession of the documents to which we have referred, and the association of the persons who were in possession of those documents, lead us to the conclusion that the Crown has established that a conspiracy existed, having for its aim the objects stated in the charge.

It now becomes necessary to see how far the evidence affects each of the prisoners who stand in the dock as indicating that they are implicated in this design.

The first piece of evidence we have to consider is the statement of Abani to which we have referred a short time ago. It is argued on behalf of the Crown that that statement comes within the provisions of s. 10 of the Indian Evidence Act, and is, therefore, to be treated as evidence against Abani's fellow-prisoners. It is said that, if it does not fall within s. 10, at any rate, under the provisions of s. 30, it is a confession of one of the co-accused and may be referred to in the course of the trial. It is argued by Mr. Roy with very considerable force that, in any case, its value can be no higher than that of the evidence of an accomplice, and that, indeed, it is of less value than the evidence of an accomplice, because an accomplice can be cross-examined for the purpose of testing his accuracy, while this confession of Abani made when he was a prisoner cannot be subjected to that test. There is, of course, very great force in that argument. We have come to the conclusion that the statement of Abani cannot properly be treated as evidence under s. 10 of the Evidence Act. That section, in our view, is intended to make evidence communications between different conspirators, while

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the conspiracy is going on, with reference to the carrying out of the conspiracy. No doubt s. 10 is wider than the law of England as to evidence in cases of conspiracy. But we do not think that that section is intended to make evidence the confession of a co-accused, and put it on the same footing as a communication passing between conspirators, or between conspirators and other persons, with reference to the conspiracy. But with regard to s. 30 in our opinion the statement, being the confession of a co-accused, can be looked at under that section. But its value is discounted by the fact that it cannot be tested by cross-examination. We do not think for a moment of putting it any higher than the statement of an accomplice, nor can we in any way allow ourselves to be influenced by the statements in it, except where those statements are corroborated by independent testimony implicating the accused persons in the design with which they are charged.

[Their Lordships then discussed the evidence against each of the accused and concluded as follows:—]

Bearing in mind that the offence charged is complete when the facts are proved from which it can be inferred that there is an agreement come to for the purpose of carrying out the objects stated in the charge, and bearing in mind the nature of the documents found in the possession of some of the prisoners, and that persons in association with them were doing acts which, in fact, promoted the objects laid down in these documents, we are satisfied that the charge has been made out in respect of the 11 persons with whom we dealt in the earlier part of our judgment.

With regard to the sentences which we are bound to inflict, we shall avail ourselves of the provision which is to be found in s. 121 A, which permits transportation to be awarded for periods shorter than those for which transportation is permitted in other cases. With regard to the prisoners Abani Bhushan Chuckerbutty, Aswini Kumar Bose, Kali Das Ghose, Nagendra Chandra Chandra, Sachindra Lal Mitra and Bidhu Bhusan Dey, we have come to the conclusion that these persons are the most deeply implicated and are the most promi-

ent members of the conspiracy which we have had to investigate. At the same time the fact that they have not been shown to have carried out their operations to the length which has been disclosed in other cases of conspiracy of a similar nature which have recently been tried, justifies us, we think, in passing less severe sentences than the Court was bound to pass in other cases which have been brought before it. But, at the same time, the sentences must be severe, and these persons must be removed from the scene of their criminal activity for a considerable period. The sentence which we pass on Abani Bhushan Chuckerbutty, Bidhu Bhushan Dey, Aswini Kumar Bose, Nagendra Chandra Chandra, Kali Das Ghose and Sachindra Lal Mitra is that they be, each of them, transported for a period of seven years. In the case of Abani Bhushan that sentence will be concurrent with the sentence which he is at present suffering in respect of a dacoity carried out in pursuance of this conspiracy.

With regard to the next three persons, Nagendra Nath Sarkar, Sudhir Kumar De and Prio *alias* Kinu Pai, whom we consider as occupying less prominent positions in the conspiracy, the sentence which we award is that each of them be transported for a period of five years.

The next two men, Brajendra Kumar Dutta and Satish Chandra Chatterjee, who, in our view, occupied even a less important part in the conspiracy than the other persons to whom we have referred, but who were yet parties to the agreement which was come to, we direct that they be each transported for a period of three years.

The remaining two persons, Mohini Mohan Mitra and Manmatha Nath Mitra, are acquitted, and we direct that they be discharged.

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## CRIMINAL REVISION.

*Before Mr. Justice Holmwood and Mr. Justice Doss.*

1910

Sept. 2.

PARMESWAR SINGH

*v.*

EMPEROR.\*

*Criminal Trespass—Mischief—Entry by a servant upon land in the possession of the Court of Wards and cutting bamboos thereon under the order of the owner—Penal Code (Act XLV of 1860), ss. 426, 447.*

A servant of a proprietor who has voluntarily surrendered his estate to the Court of Wards does not commit criminal trespass or mischief by cutting or removing bamboos etc growing thereon, for the benefit of his master, under the circumstances of this case.

THE petitioner, who was a *peada* in the service of Rash Behari Lal Mandar, whose estate was voluntarily surrendered by him to the Court of Wards in March 1909, was tried by Babu Anant Lal Chatterjee, Deputy Magistrate of Bhagalpore, on the complaint of a tehsildar of the Court of Wards, under ss. 447 and 426 of the Penal Code, and convicted and sentenced thereunder, on the 28th June 1910, to a fine of Rs. 200. The petitioner entered upon certain lands and cut some bamboos and *kharhi* (grass for matting walls) on 4th May 1910, under the order of Rash Behari, for the purpose, it was said, of obtaining materials for the construction of a lying-in room for Rash Behari's wife.

The defence alleged that the bamboos and *kharhi* were cut from the *jote* lands of one Bandey Lal, which did not form part of the estate taken over by the Court of Wards, but the Magistrate disbelieved the story and found that the lands belonged to Rash Behari and were in the possession of the Court of Wards. An application was made against the order of the Magistrate to the Sessions Judge of Bhagalpore who declined to interfere, whereupon the petitioner moved the High Court and obtained the present Rule.

\* Criminal Revision, No. 998 of 1910, against the orders of J. C. Twidale, Sessions Judge of Bhagalpore, dated July 26, 1910

*Mr. Ahmad and Babu Manmatha Nath Mookerjee*, for the petitioner.

*Mr. Buckland*, for the Crown.

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HOLMWOOD AND DOSS JJ. This was a Rule calling upon the District Magistrate of Bhagalpore to show cause why the conviction and sentence should not be set aside, or why such other order should not be made as to this Court may seem fit and proper.

The principal ground on which we are asked to interfere in this case is that the matter does not come within the purview of the criminal law. Upon the findings in the Lower Court it appears to us that this contention must prevail. It is perfectly clear that the Deputy Magistrate in the Court below held that these bamboos belonged to the estate of Rash Behari Lal Mandar, and that the accused was a *peadu* acting solely in his interest. He has altogether dismissed and disbelieved the case that the bamboos stood on the *jote* land of Bandey Lal. Accepting this finding, it amounts to this: that Rash Behari Lal Mandar removed or damaged his own bamboos which were in the possession of the Court of Wards under the Act. The charge of theft has already been disposed of by the learned Magistrate in the Lower Court. The charge of criminal trespass does not lie, inasmuch as the accused was entering upon property in the possession of his master without intending to commit an offence, or to intimidate, insult or annoy the Court of Wards.

Then if it is not a criminal trespass the question arises if it is mischief. Now it is a well-known rule of law that a man may commit mischief by damaging his own property, provided he does so in order to cause wrongful loss to somebody else, or knowing it to be likely to cause wrongful loss to somebody else. But it can hardly be said that a man who damages his own estate, although he has at present only a qualified interest damages the trustees in possession, whose only object is to preserve the estate for the benefit of the owner. The difficulty appears to have arisen from the amendment of the Court of Wards Act, made some years ago, by which a proprie-

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tor may voluntarily surrender his own estate to the Court of Wards. It is obvious that in such a case the proprietor may, after surrendering his estate, cause trouble to the Court of Wards by contumacious conduct such as is alleged in this case. And it is surprising that there appears to be no procedure by which the Court of Wards can deal with such conduct. But this is a matter with which we are not concerned in the Criminal Court. In this case we have only to decide whether the findings bring the case within the four walls of the Indian Penal Code. Having given our careful consideration to the case we are decidedly of opinion that it does not. The Rule, therefore, must be made absolute. We set aside the conviction of, and the sentence passed upon, the petitioner. The fine, if paid, must be refunded.

E. H. M.

*Rule absolute.*

## CIVIL REFERENCE.

*Before Mr. Justice D. Chatterjee and Mr. Justice Richardson.*

1910  
 Sept. 5.

GUR PERSHAD SINGH

v.

DHANI RAI.\*

*Succession Certificate—Mitakshara Law—Impartible Estate—Arrears of rent converted to a bond—Debt due to last holder of impartible estate if "effects of the deceased" in the hands of the successor—Succession Certificate Act (VII of 1889), s. 4.*

Where in lieu of arrears of rent a bond was given to the holder of an impartible estate:—

*Held*, that the debt due is not, in the hands of the successor to the estate, a part of the effects of the deceased within the meaning of section 4 of the Succession Certificate Act, but is in its nature, a family debt accruing to him by right of survivorship.

*Jagmohandas Kilabhai v. Allu Maria Duskal* (1), *Beejraj v. Bhyro-persaud* (2), *Bissen Chand Dudhuria Bahadur v. Chatrapat Sing* (3), *Katama Natchier v. The Rajah of Shivagunga* (4), *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora* (5) referred to.

\* Civil Reference, No. 2 of 1910, by J. C. Twidale, District Judge of Bhagalpore, dated March 4, 1910.

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| (1) (1894) I. L. R. 19 Bom. 338.  | (4) (1863) 9 Moo. I. A. 539.  |
| (2) (1896) I. L. R. 23 Calc. 912. | 2 W. R. P. C. 31.             |
| (3) (1895) 1 C. W. N. 32.         | (5) (1870) 13 Moo. I. A. 333. |



## CIVIL REFERENCE.

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THE original suit was for the recovery of Rs. 150, upon a registered bond. The plaintiff had succeeded to the Khaira raj, which was stated to be an impartible estate, by virtue of the custom of primogeniture. The defendant had given to the plaintiff's father a bond, in lieu of certain arrears of rent. This suit was for recovery of these arrears. The Munsif had dismissed the suit, holding that a succession-certificate was necessary. On appeal by the plaintiff, the District Judge, at his request, made this Reference for a decision by the High Court on the question whether the suit could lie without the production of a succession-certificate.

*Mr. B. Chakravarti* (with him *Babu Nareshchandra Sinha*), for the petitioner. The real question is whether the debt sued for was the 'effects' of the deceased Raja or was a part of the joint family property. An impartible raj is a joint family property, although the Raja can, subject to charges for maintenance of the junior members, appropriate the income for his own exclusive purposes. If the Raja invest the income derived by the raj, it may be the personal property of the Raja. An impartible raj has all the incidents of a joint family property, subject, however, to its being converted to a separate estate under certain circumstances and subject to the expectation of survivorship being defeated either by transfer *inter vivos* or by testamentary disposition. If the holder does not exercise his right to treat the income as separate property, as in the case of Hindu widows, it would pass by survivorship and does not pass to his heirs. Succession to an impartible estate is by survivorship, and no succession certificate is necessary: *Katama Natchier v. The Rajah of Shiva-gunga* (1), *Subramanya Pandya Chokka Talavar v. Siva Subramanya Pillai* (2), *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Singh* (3), *Sartaj Kuari v. Deoraj*

(1) (1863) 9 Moo. I. A. 539;  
 2 W. R. P. C. 31.

(3) (1890) I. L. R. 18 Calc. 151.  
 L. R. 17 I. A. 128.

(2) (1894) I. L. R. 17 Mad. 316.

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*Kuari* (1), *Doorga Persad Singh v. Doorga Konwari* (2), *Sivagnana Tevar v. Periasami* (3), *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora* (4), *Sri Rajah Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards* (5).

*The Senior Government Pleader (Babu Ram Charan Mitra) and Babu Birajmohan Majumdar, for the Crown.* In an ordinary Mitakshara family no succession-certificate is necessary, because the debt is due to the corporation or the family. An impartible estate is the exclusive property of the Raja for the time being. It is considered as joint family property only for the purpose of finding out the successor by survivorship, but not for any other purpose. Coparcenership does not exist. Community of interest would be restraint on alienation, but impartible estates can be alienated: see R. C. Mitra's Tagore Law Lectures on Partition, p. 278. *Bissumbhur Shi v. Syud Bukto Bedarul Hossein* (6), *Sartaj Kuari v. Deoraj Kuari* (1), *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards* (5).

The defendant's vakil adopted the arguments of the learned Government pleader.

CHATTERJEE AND RICHARDSON JJ. The plaintiff's father, Raja Ram Narain Singh, of Khaira, had to receive certain arrears of rent from the defendant: the defendant was unable to pay cash, and gave instead a bond for the amount of the arrear. The Raja then died, and the plaintiff succeeded to the raj, which is an impartible estate. The plaintiff brought this suit on the bond, and the defendant did not contest the suit. But the learned Munsif objected that the suit could not be maintained, as the plaintiff had not taken a certificate of succession. The plaintiff was given some time for filing a certificate, but he

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| (1) (1888) I. L. R. 10 All. 272; | (4) (1870) 13 Moo. I. A. 333, 339. |
| L. R. 15 I. A. 51.               | (5) (1899) I. L. R. 22 Mad. 382;   |
| (2) (1878) I. L. R. 4 Calc. 190; | L. R. 26 I. A. 83, 88.             |
| L. R. 5 I. A. 149.               | (6) (1872) 17 W. R. 406.           |
| (3) (1878) I. L. R. 1 Mad. 312;  |                                    |
| L. R. 5 I. A. 61, 70.            |                                    |

did not file one, and the suit was dismissed. On appeal by the plaintiff the learned District Judge has, at his request, made this Reference to us as to whether a certificate of succession was necessary in this case, his own opinion being in favour of the affirmative. It is contended by the plaintiff before us that as his family is governed by the Mitakshara law, he succeeded by right of survivorship to the estate of which the bond in dispute is a part, and he was therefore not bound to produce a certificate before he could get a decree. The learned senior Government pleader has appeared for the Crown to support the opinion of the lower Court.

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Section 4 of the Succession Certificate Act, VII of 1889, provides that "no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, etc." The question, therefore, that requires decision is whether the money in suit can be called "the effects of the deceased person." The necessity for the certificate upon the plain language of the Act depends upon the question whether the debt was part of "the effects of the deceased or was in its nature a family debt and therefore family property." "It is confined to the case in which the claim is to the effects of the deceased, and not to family property, where the claim is by right of survivorship . . ." Per Sargent, C.J. *Jagmohandas Kilabhai v. Allu Maria Duskal* (1). The same view has been followed in our Court, *Beejraj v. Bhoyropersaud* (2), *Bissen Chand Dudhuria Bahadur v. Chatrapat Sing* (3). It is not denied that, if the case were one of an ordinary joint family governed by the Mitakshara law, no certificate would be required. The whole difference here is said to consist in the fact that the estate is an impartible raj governed by the rule of primogeniture. As regards the nature of property in an impartible raj, the Privy Council in the *Shivagunga case* (4) observed: "If the zemindar at the time of his death and his nephews were members of an undivided Hindu family, and the zemindari, though impartible,

(1) (1894) I. L. R. 19 Bom. 338. (3) (1895) 1 C. W. N. 32.

(2) (1896) I. L. R. 23 Calc. 912. (4) (1863) 9 Moo. I. A. 539.

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was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle." Again, in the case of *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumuka Boochia Vankondora* (1), the same august Tribunal said: "Their Lordships are of opinion that the estate was in its inception part of the common family property, though impartible, and therefore with certain qualifications enjoyable by only one member of the family at the time." Succession to such estates has always been determined by the rule of survivorship: see *Naragunty Lutcheedavamah v. Vengama Naidoo* (2), the Ramgarh case [*Heeranath Koor v. Burm Narain Singh* (3)], *Chintamun Singh v. Nowlukho Konwari* (4), *Sivagnana Tevar v. Periasami* (5), *Raja Rup Singh v. Rani Baisni* (6), *Doorga Persad Singh v. Doorga Konwari* (7). An ancestral estate, even though impartible, is not the separate property of the single member upon whom it devolves so long as the family is joint. Per Sir Barnes Peacock in *Raja Rup Singh's case* (6). "The impartibility of the property does not destroy its nature as joint family property, or render it the separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate." Per Sir Barnes Peacock in *Doorga Persad Singh v. Doorga Konwari* (7). In this state of the law their Lordships had to decide, in the case of *Sartaj Kuari v. Deoraj Kuari* (8), the question whether the son and successor in an impartible estate has any right to impeach an alienation made by his father, the last incumbent of the raj. Their Lordships held that this particular question did not arise in the above cases, and the remarks as to the property being joint property of the family must be understood

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| (1) (1870) 13 Moo. I. A. 333, 339. | (6) (1884) I. L. R. 7 All. 1;    |
| (2) (1861) 9 Moo. I. A. 66.        | L. R. 11 I. A. 149.              |
| (3) (1872) 17 W. R. 316.           | (7) (1878) I. L. R. 4 Calc. 190; |
| (4) (1875) I. L. R. 1 Calc. 153;   | B. R. 5 I. A. 149.               |
| L. R. 2 I. A. 263.                 | (8) (1888) I. L. R. 10 All. 272; |
| (5) (1878) I. L. R. 1 Mad. 312;    | L. R. 15 I. A. 51.               |
| L. R. 5 I. A. 61.                  |                                  |

with reference to the question which was before their Lordships in those cases. On the particular question in that case they held that the alienation was quite valid, unless any custom to the contrary could be proved. Their Lordships said: "The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is so connected with the right to a partition that it does not exist where there is no right to it," again, "though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the Mitakshara law is created by birth does not exist." Notwithstanding this view of their Lordships, however, as to the right of any particular incumbent of an impartible estate, it has always been held in conformity with the previous rulings of their Lordships that the rule of succession is by survivorship. *Jogendro Bhupati Hurrochundra Mahapatra v. Nityanand Man Sing* (1), *Kali Krishna Sarkar v. Raghunath Deb* (2). It is true that in the Full Bench case of *Amar Chandra Kundu v. Sebak Chand Chowdhury* (3) a Mitakshara son was held to be a legal representative of his father within the meaning of section 234 of the old Civil Procedure Code for the purpose of working out an execution against him of a decree obtained against his father, but that is a question of procedure, and does not take away from the substantive law that the son succeeds by the rule of survivorship. In any case he does not succeed as an heir to the effects of the deceased. He succeeds by right of survivorship, although his other rights under the law were in abeyance during the lifetime of the last incumbent on account of the peculiar nature and incidents of the property in question. He is not therefore bound to produce a succession certificate before he can obtain a decree. The suit must therefore be decreed with costs of the first Court only against the defendant as in an *ex parte* case. We may add that our judgment proceeds on the assumption that the family is governed by the Mitakshara law as applicable to impartible estates.

S. M.

- (1) (1890) I. L. R. 18 Cal. 151; (2) (1903) I. L. R. 31 Cal. 221.  
I. R. 17 I. A. 128. (3) (1907) I. L. R. 34 Cal. 642.

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## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,  
and Mr. Justice Woodroffe.*

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RADHA PRASAD MALLICK

v.

RANIMONI DASL.\*

*Hindu Law—Will—Construction of will—Judgment of Privy Council—  
“In equal shares for life and with benefit of survivorship between themselves”  
—Judgment to be limited to the events then happened—Gift to a class valid,  
although some of class born after testator’s death, and hence incapable of  
taking—Hindu Wills Act (XXI of 1870) ss. 2, 3—Indian Succession Act (X of  
1865) ss. 85, 98, 100, 101, 102—Incorporation of statutes—Liberty to apply—  
Practice.*

The will of a Hindu directed his executors in certain events (which happened) “to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give devise and bequeath the same but should either of my said daughters die without leaving any male issue surviving but leaving my other daughter her surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in the case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike.” The testator died leaving him surviving his widow, two daughters R. and P. and three sons of P. viz., R. P., K. P. and J. P. At the time of the happening of the events on which the gift in favour of the daughters and their sons came into operation, there were living R. and P. and four sons of P. viz., R. P., K. P., P. L. and B. L., the latter two of whom were born subsequent to the testator’s death.

In a suit brought by R. for the construction of the will and a declaration of the rights of the parties, the Privy Council held that “in the events that had happened, the daughters R. and P. were entitled to the testator’s estate in equal shares for life and with benefit of survivorship between themselves.” The liberty to apply reserved by the High Court to the parties, amongst whom were the sons of P., was affirmed.

Subsequent to the order in Council, P. died leaving her sons R. P., K. P., P. L. and B. L. her surviving. R. P. and K. P. thereupon claimed to be entitled to their mother’s share. An application, in this behalf, was made by R. P. to the High Court:—

*Held*, that the application was properly made, under the liberty reserved.

\* Appeal from Original Civil, No. 24 of 1910, in Suit No. 912 of 1904.



The Privy Council in making their order intended only to describe the utmost interest that the daughters could take as between themselves in the events which up to that time had happened, and had no intention to decide the rights of sons in reference to a subsequent contingent event, which had now happened in the death of P. leaving sons.

The canon of construction to be applied to a statute incorporating the provisions of another statute, as defined in *In re Wood's Estate* (1) approved of.

Section 3 of the Hindu Wills Act, which controls both the quantity and quality of the interest created, including the capacity of the donee to take, modifies the operation of the incorporated section 98 of the Succession Act, by the introduction of the rule of Hindu Law, that a bequest to a person not in existence at the time of the testator's death, is void.

*Alangamonjori Dabee v. Sonatun Dabee* (2), and *Cally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry* (3) followed.

Hence P. L. and B. L. took no share and P.'s share devolved on R. P., K. P. and the representatives of J. P.

The gift to P.'s sons as a class did not become void by reason of the incapacity of some of them, viz., the after-born sons, from taking under the will, as the class intended to be benefited could be ascertained within the period permitted by law.

*Leake v. Robinson* (4) distinguished.

*Kingsbury v. Walter* (5), *Dowset v. Sweet* (6), *Young v. Davies* (7), *Shaw v. M'Mahon* (8), *Fell v. Biddulph* (9) referred to.

APPEAL by the plaintiff-petitioner from the judgment of Fletcher J.

This appeal arose out of an application made under the liberty to apply contained in the decree passed in this suit, and involved the question of the construction to be placed on the judgment of the Privy Council in *Radha Prasad Mallick v. Rane Mani Dassee* (10).

One Hurry Dass Dutt, a Hindu, governed by the Bengal School of Hindu Law, died on the 30th October, 1875, leaving a will executed on the same date, which contained the following clause: "But in case none of such adopted sons survive my said wife or in case of either surviving my said wife

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| (1) (1886) L.R. 31 Ch.D. 607, 615. | (6) (1753) 1 Amb. 175.            |
| (2) (1882) I. L. R. 8 Cal. 637.    | (7) (1863) 2 Drew. & Sm. 167.     |
| (3) (1882) I. L. R. 8 Cal. 378.    | (8) (1843) 4 Dr. & War. 431.      |
| (4) (1817) 2 Meri. 363.            | (9) (1875) L. R. 10 C. P. 701.    |
| (5) [1901] A. C. 187, 191.         | (10) (1908) I. L. R. 35 Cal. 896. |

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and dying under the said age without leaving a son or sons I desire and direct my executors after the death of my said wife or the death of such son after her but under such age of eighteen years without leaving a son or sons to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give devise and bequeath the same but should either of my said daughters die without leaving any male issue surviving but leaving my other daughter her surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in the case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike."

The testator left him surviving his widow Sreemutty Surnomoni Dasi, his daughter Ranimoni Dasi, his daughter Premmoni Dasi and three sons of Premmoni Dasi, *viz.*, the appellant Radha Prasad Mallick, Kasi Prasad Mallick and Jyoti Prasad Mallick.

The power to adopt, as expressed in a previous clause of the will, was held to be invalid by the Privy Council in *Amrito Lal Dutt v. Surnomoye Dasi* (1).

Surnomoni Dasi, the testator's widow, died on the 14th August, 1904, and the gift in favour of the testator's daughters and their sons came into operation. Subsequent to the testator's death two other sons had been born to Premmoni, Peary Lal Mallick and Behary Lal Mallick and Jyoti Prasad Mallick had died. Ranimoni had taken one Jugol Kissore Sen in adoption in 1900.

On the 19th December, 1904, the present suit was instituted by Ranimoni Dasi for the construction of the will and a declaration of the rights of the parties, the defendants being Premmoni, her four surviving sons Radha Prasad, Kasi Prasad, Peary Lal and Behary Lal, and the adopted son of the plaintiff.

The suit was heard by Woodroffe J., who observed: "The testator, in my opinion, has made an absolute gift of a moiety of the estate to each of his two daughters, the plaintiff and the defendant Premmoni: apparently also he meant to make the gift defeasible in the event of a daughter dying without male issue. As to whether the clause of defeasance is valid or not, I express no opinion, it being unnecessary to do so, unless and until the events take place upon which it is declared that it shall take effect" (1).

Against this judgment two appeals were brought, one by Radha Prasad and Kasi Prasad and the other by Peary Lal and Behary Lal. The judgment of Woodroffe J. was, however, affirmed in the main by the Court of Appeal. Their Lordships on appeal observed: "We, therefore, agree with the Court of first instance that each daughter took an absolute interest in the moiety of the estate. It is premature to decide whether the gift is defeasible in the event of their daughter dying without male issue. Following the practice adopted by the Judicial Committee in *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (2), we leave the question open, until it is ascertained what the events are" (3). Liberty was given to the parties to apply as they may be advised, and it was directed that in the event of relief by partition being prayed for, the representatives of Hurry Dass Dutt and Surnomoni should be added as parties (3).

On appeal to the Privy Council, their Lordships held that "according to the true construction of the will, the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons, and the learned Judges of the High Court ought to have held that, in the events that have happened, the daughters of the testator, Ranimoni Dasi and Premmoni Dasi, are entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves." In other respects the judgment and decree of the High Court was affirmed (4).

(1) (1905) I. L. R. 33 Cal. 955.

(2) (1897) I. L. R. 24 Cal. 834;

I. R. 24 I. A. 76.

(3) (1906) I. L. R. 33 Cal. 917.

965, 966.

(4) (1908) I. L. R. 35 Cal. 896.

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On the 8th May, 1909, subsequent to the order in Council, Premmoni Dasi died leaving her surviving her four sons, Radha Prasad, Kasi Prasad, Peary Lal and Behary Lal.

Radha Prasad now claimed to be entitled with his brother Kasi Prasad to their mother's share in the estate, and applied under the liberty reserved, to have the suit set down for further consideration.

His claims were resisted by his brothers Peary Lal and Behary Lal, and by Ranimoni Dasi and her adopted son Jugol Kissoore.

The matter was heard before Fletcher J. sitting on the Original Side and, on the 4th March, 1910, his Lordship gave judgment as follows :—

This suit is set down for further consideration. The suit relates to the construction of the will of one Hurry Dass Dutt who died on the 30th October 1875. This suit was instituted among other things for the construction of the will of the testator and the Privy Council has decided the nature of the two daughters' interest in the residuary estate. The case came on in the first instance before Mr. Justice Woodroffe who held that the daughters took an absolute interest. That decision was affirmed by the Court of Appeal. The appeal was carried to His Majesty in Council by one of the sons of a daughter and the question raised was what was the nature of the daughters' rights and interests under the will.

The Judicial Committee of the Privy Council in 1908 decided that both the two daughters of the testator in the events that have happened were entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves. The order in Council adopted *verbatim* these words and directed that the decree of the High Court be varied by substituting therein the words "that in the events that have happened each of the daughters of the testator is entitled to the estate of the said testator including the additions and accretions thereto in equal shares for life and with benefit of survivorship between themselves." It was contended by learned Counsel on behalf of the petitioner that under the Privy Council decision each daughter took such an interest in a moiety of the estate as would on her death leaving sons pass to such sons and not to the surviving daughter. It is only necessary to read that portion of the judgment (1) where Sir Andrew Scoble says "The only question raised upon this appeal is as to the nature of the estate which, in the events which have happened, the testator's daughters take under the terms of the will."

The question involved in the appeal was what were the rights and interests of the daughters under the will. Sir Andrew Scoble con-

continues:—'In the opinion of their Lordships, according to the true construction of the will, the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons, and the learned Judges of the High Court ought to have held that, in the events that have happened, the daughters of the testator, Ranimoni Dasi and Premmoni Dasi, are entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves.' (1).

It is not unimportant that the judgment which is carefully worded says that the daughters take an estate for life and their sons a remainder. Mr. Stokes has argued that the Privy Council intended to imply that the estate had been divided into equal moieties and that there was an absolute separation. It is hardly likely that the Judicial Committee would state that the daughters took an estate and the respective sons a remainder if that be so. After the decision of the Privy Council it is not open to the parties to say that the daughters do not take the estate for life with benefit of survivorship. The order in Council means what it says. This application ought never to have been brought in this Court and I must order the applicant to pay the costs of all parties.

From this judgment and order the petitioner, Radha Prasad Mallick, appealed.

*Mr. S. R. Das*, for the appellant.

*Mr. B. C. Mitter* (with him *Mr. Lahiri*), *Mr. B. Chakravarti* (with him *Mr. C. C. Ghose*), *Mr. R. C. Sen*, *Mr. Sircar* (with him *Mr. R. C. Bonnerjee*), for the various respondents.

JENKINS C.J. This appeal arises out of an application made under the liberty to apply contained in the decree passed in this suit, and it involves the question—whether in the events that have happened the applicant, the appellant before us, has a present interest under the will dated the 30th October 1875 of Hurry Dass Dutt, who died on the same day. In that will there is a clause in these terms:—

“But in case none of such adopted sons survive my said wife or in case of either surviving by said wife and dying under the said age without leaving a son or sons I desire and direct my executors after the death of my said wife or the death of such son after her but under such age of eighteen years without leaving a son or sons to make over and divide the whole of my estate both real and personal unto and between my

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daughters in equal shares to whom and their respective sons I give devise and bequeath the same but should either of my said daughters die without leaving any male issue surviving but leaving my other daughter her surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in the case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike."

The testator left him surviving his widow Surnomoni Dasi, his daughter Ranimoni Dasi, his daughter Premmoni Dasi and three sons of Premmoni Dasi, *i.e.*, the appellant Radha Prasad Mallick, Kasi Prasad Mallick, and Jyoti Prasad Mallick.

It is common ground that those events have happened in which the gift in favour of the testator's daughters and their sons is expressed to come into operation. It is in these circumstances that the present suit was instituted and the first question of construction that arose was whether the daughters took absolute or limited interests. In reversal of the High Court's view it has been held by the Privy Council that the daughters did not take absolute interests and in the order in Council consequent on that decision it was ordered that the decree of the High Court be varied by substituting for the words therein contained "are each absolutely entitled to a moiety or half part of the estate of the said testator including the additions and accretions thereto" the words "are in the events that have happened entitled to the estate of the said testator including the additions and accretions thereto in equal shares for life and with benefit of survivorship between themselves." In other respects the decree of the High Court was affirmed.

Since this order Premmoni has died leaving sons, and Radha Prasad Mallick, one of them, claims to be entitled with his brother Kasi Prasad to her share and so to apply under the liberty in that behalf contained in the decree. His opponents are his brothers Peary Lal and Behary Lal who were born after the testator's death, his aunt Srimutty Ranimoni



Dasi and her adopted son Jugol Kissore, whose adoption took place on the 2nd November 1900.

An objection has been taken at the outset that the appellant has no right to make this application, but should have brought a suit for this purpose.

But in my opinion this objection is not well founded. The decree of the High Court after declaring the rights of the daughters reserved to the parties liberty to apply for partition upon the necessary parties being added and generally from time to time as they might be advised. This part of the decree was affirmed by the Privy Council. Now the present appellant is a party in whose favour liberty to apply has been reserved, and when regard is had to the nature of the suit and the decree that has been passed and to all the circumstances it seems eminently proper that the liberty so reserved should be utilised for the purpose of completing the decree and of thus determining the question of construction which arises out of the fresh events that have happened.

The contention that a separate suit should have been brought does not commend itself to me; it would involve greater expense and delay and it has not been shewn that this procedure prejudices anyone. I therefore hold that the question of construction discussed before us can be properly decided on an application under the liberty to apply. No exception has been taken to the form in which the application has been made or its appropriateness, apart from the objection of jurisdiction, so that I need not enter on that. This brings me to the question of substance that arises on this appeal, and it is this: in the events that have happened has Ranimoni become entitled to the whole income of the estate or have Premmoni's sons become entitled to the capital of their mother's share? Fletcher J. has decided this in Ranimoni's favour on the construction of the order in Council, and this seemed to the learned Judge so clear that he expressed the view that the application ought never to have been brought and he ordered the applicant to pay the costs of all parties.

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First then I turn to the order in Council and there I find it declared that the daughters "are in the events that have happened entitled to the estate of the said testttor in equal shares for life and with benefit of survivorship between themselves." It may be that these words standing alone and isolated from the surrounding circumstances have the force that has been ascribed to them by the learned Judge, but to appreciate their real meaning regard must be had to the facts to which they relate and to the opinion on which they were founded. Now it is stated by their Lordships almost at the outset of their opinion that the only question raised on the appeal was as to the nature of the estate, which in the events which had happened, the testator's daughters took under the terms of the will. And at this point it is important to bear in mind what those events were, and also that the High Court had determined that the daughters each took a half share in the testator's estate absolutely, but expressed the view that it would be premature to decide whether that gift was defensible in the event of either daughter dying without male issue, and they expressly left the question open until it was ascertained what the events were. Their Lordships of the Privy Council while dissenting from the views that the daughters took absolute interests went on to describe the utmost interest that they did and could take in the events which up to that time had happened as between themselves and apart from any subsequent disturbing event.

As I read the opinion and order in Council there was no intention to decide the rights of sons in reference to a subsequent event which might or might not happen, and this would accord with what I understand to be the practice in ordinary cases. But now a fresh event has happened, for Premmoni has died leaving sons, and this, as it seems to me, takes the case outside the purview of the order in Council so that the effect of the will under the altered circumstances has to be considered.

Now the will contemplates two events and the provision applicable in the event that has happened is in these terms:

—“In the case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike,” and in connection with this provision the opening words of the gift have to be kept in view. Though this part of the clause has not been specifically construed by their Lordships of the Privy Council, they have indicated their views as to what the testator meant and have stated that according to the true construction of the will the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons. It seems probable that the word remainder was not used with the special significance that attaches to it in English real property law, but was borrowed from the language of the High Court to emphasize the contrast between the view taken by the High Court and the Privy Council. Accepting then this as the intention of the testator is there any legal obstacle in its way? Now it has to be remembered that after the testator's death two sons were born to Premmoni, the defendants—Peary Lal and Behary Lal, and that of her sons living at the testator's death Jyoti Prasad predeceased her.

The gift is to a class, and the first point to be decided is one of construction: who come within the class? Having regard to the date of the will it is regulated as to its interpretation by the Hindu Wills Act 1870 and the incorporated provisions of the Indian Succession Act 1865.

The method of incorporation has been the subject of judicial comment and even animadversion, but the canon of construction to be applied has been thus defined by Lord Esher in *In re Wood's Estate* (1):—“If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all.” This then is the rule by which the Court is to be guided.

(1) (1886) L. R. 31 Ch. D. 607, 615.

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Section 85 of the Succession Act provides that "where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy." By section 98 it is provided that "where a bequest is made simply to a described class of persons the thing bequeathed shall go only to such as shall be alive at the testator's death." These two sections are in Chapter XI and they deal with the construction of wills.

Chapter XII, however, is concerned with a different topic, "void bequests" and by section 100 it is provided:—"Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the later bequest shall be void unless it comprises the whole of the remaining interest of the testator in the thing bequeathed." Section 101 formulates the rule against perpetuity with which we have nothing to do, while section 102 provides that "If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding sections or either of them, such bequest shall be wholly void."

Section 3 of the Hindu Wills Act 1870 is by way of a proviso to the portions of the Succession Act incorporated by section 2 and it is thereby provided that nothing in the Act contained "shall authorise any Hindu, Jain, Sikh or Buddhist to create in property any interest which he could not have created before the first day of September 1870." Whether this provision has regard only to the nature of the interest or extends also to the capacity of the person in whose favour the interest is expressed to be created has been a matter of considerable discussion. If the narrow view be adopted, nothing in the shape of repugnancy would arise on the construction of the Act, but this cannot be said of the wider view; indeed its adoption involves to an appreciable extent the nullifying of that which has been incorporated. But to discuss the respective merits of these rival constructions would profit nothing for the point is covered by authority

binding on us and going as far back as 1882, when it was decided by the Court of Appeal reversing the judgment of Wilson J. as he then was, that the proviso I have read controls both the quantity and quality of the interest created and in its natural and ordinary meaning includes the capacity of a donee to take: *Alangamonjori Dabee v. Sonamoni Dabee* (1). Pontifex J. in *Cally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry* (2), expressed an opinion to the same effect.

Accepting then, as I must, this as the true meaning of section 3 I will now consider what its effect is in the circumstances of this case.

The gift is to the son or sons of Premmoni share and share alike, but their possession of it is deferred until a time later than the death of the testator by reason of the prior bequest to their mother, so that under section 98 the property at their mother's death would go to such of the sons as should be then alive and to the representatives of any of the sons who had died since the death of the testator. According to this the property would go in five equal shares to Radha Prasad, Kasi Prasad, Peary Lal, Behary Lal and the representatives of Jyoti Prasad. But this result must be controlled by the proviso in section 3 of the Hindu Wills Act and the rule of Hindu Law that a bequest to a person not in existence at the time of the testator's death is void so that the saving provision in section 100 cannot be applied. The result then is that Peary Lal and Behary Lal cannot take.

What then is the effect of this? On behalf of Ranimoni it is contended that as some of the class cannot take, the whole gift is void and in support of this, *Leake v. Robinson* (3) has been cited. But this contention proceeds on a misapplication of this case and a misconception of the true nature of a gift to a class. In *Leake v. Robinson* (3), the gift to the class failed because the class could not be ascertained within the period allowed by the rule against perpetuities. The gift here in no way offends that rule: its only fault is

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(1) (1882) I. L. R. 8 Calc. 637. (2) (1882) I. L. R. 8 Calc. 378.

(3) (1817) 2 Meri. 363.

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that the class of legatees includes some who were not in existence at the date of the testator's death and were thus under a personal incapacity. And the difference is obvious. In a gift to a class the testator looks to the body as a whole rather than to the members constituting that body: *Kingsbury v. Walter* (1), and the class is in a sense personified. But if that class cannot be ascertained until a time beyond that permitted by the rule against perpetuity there is no class to which the gift can legally be made. But if as here the fault is not that the class cannot be ascertained within the period permitted by law, but that certain members of the class are incapable of taking, different considerations apply. Now according to section 98 sons living at the death of the testator would take and the provision in favour of the representatives of deceased sons shows that the sons would take vested interests. Apart from the rule against gifts to unborn persons the class thus taking would be liable to enlargement with a corresponding divestment of vested shares. But where that rule applies there can be no divestment for a vested interest cannot be divested by a person incapable of taking.

The incapacity therefore of some members of the class does not invalidate the gift under the Succession Act which in this respect seems to be in harmony with the current of English authority on this point: *Dowest v. Sweet* (2), *Young v. Davis* (3), *Shaw v. McMahon* (4), and *Fell v. Biddulph* (5).

This view of section 98 and its effect is borne out by the general scheme of the Succession Act. Chapter XII is headed "of void bequests" and it indicates the grounds on which a gift to a class is void: They are limited to those set forth in sections 100 and 101. But the gift here certainly does not offend the rule against perpetuity contained in section 101. the only question is whether it comes within section 100. I do not think it does. But for the rule of Hindu Law which forbids the gift to an unborn person, this gift in reversion to

(1) [1901] A. C. 187, 191.

(3) (1863) 2 Drew. &amp; Sm. 167.

(2) (1753) 1 Amb. 175.

(4) (1843) 4 Dr. &amp; War. 431.

(5) (1875) L. R. 10 C. P. 701.



sons would be good as it comprises the whole of the remaining interest of the testator in the thing bequeathed and the gift to the unborn sons would therefore have been valid.

It is the rule of Hindu Law in combination with the interpretation that has been placed on section 3 of the Hindu Wills Act that avoids the gift, so that it cannot be said that the bequest to the class is inoperative with regard to some of that class by reason of the rule contained in section 100. And so the ground of avoidance on which the gift to Premmoni's sons as a class is open to attack is not one for which provision is made by the Act. The result then is that the gift to the class is good, but reading section 3 of the Hindu Wills Act in the sense that has been ascribed to it the after-born sons Peary Lal and Behary Lal cannot take, so that those now entitled to participate are Radha Prasad, Kasi Prasad and the representatives of Jyoti Prasad and between them the property bequeathed will be divided in three equal shares.

Having regard to all the circumstances I think this is a case where the costs of all parties in the Court of first instance should come out of the estate and also the costs of the appeal. There will be liberty to apply to the Judge sitting on the Original Side, if necessary, as to realizing the money necessary for raising these costs. The case will now go back to the Court of first instance.

WOODROFFE J. I agree.

*Appeal allowed.*

I. C.

Attorneys for the appellant: *Watkins & Co.*

Attorneys for the respondents: *P. C. Law, Watkins & Co., R. Rutter, Jr., A. N. Chunder.*

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## APPELLATE CRIMINAL.

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*Printing Press, forfeiture of—"Newspaper," definition of—Paper not containing periodically public news or comments thereon—Onus of proof of character of the paper—Formal proof of newspaper and offending matter—"Incitement" to murder and acts of violence—Use of seditious language—Newspapers (Incitement to Offences) Act (VII of 1908) ss. 2 (1), (b), 3—Power of third Judge on difference of opinion between Judges of the Court of Appeal, to deal with the whole case against an accused—Criminal Procedure Code (Act V of 1898) s. 429.*

The definition of a "newspaper" in s. 2 (1) (b) of Act VII of 1908 must be read as a whole. It refers to a work which publishes periodically public news or comments thereon. It is not enough to take a single issue of it, and to pick out an isolated sentence or a paragraph therein which might by stretch of language be interpreted to contain public news or comments thereon.

When it is disputed whether a work is a "newspaper" the prosecution ought to establish its alleged character by proof of the contents of more than one issue.

To bring a case under s. 3 (1) of the Act the character of the offending paper as a "newspaper" has to be first established, and this may not always be possible by the production and proof of the contents of one issue only.

In a proceeding under s. 3 of the Act the newspaper and the offending matter must be regularly proved. In such cases it is essential that the proceedings should be regularly conducted and the forms of law observed.

Section 3 (1) of the Act confers very limited powers of forfeiture and applies only to the cases of presses used for the printing of newspapers which contain an incitement to the particular crimes or classes of crimes specified therein.

The word "incitement" clearly implies the idea of rousing to action, instigation or stimulation. The use of seditious language, sufficient to bring the case under s. 124 A of the Penal Code, is not equivalent to

\* Criminal Appeal, No. 121 of 1910, against the order of R. C. Hamilton, District Magistrate of Khulna, dated Jan. 25, 1910.

an incitement to offences mentioned in s. 3 (1) of Act VII of 1908. A thinly veiled glorification of rebellion implying a desire on the part of the writer that there should be a successful rebellion, though it may amount to sedition under s. 124 A of the Penal Code, is not sufficient to bring the case within s. 3 (1) of the Act. There must be something more direct and specific for that purpose.

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In the case of two prisoners, regarding the guilt of one of whom only the Judges of the Appellate Court are divided in opinion, it may be that what has to be laid before another Judge is the case of such prisoner alone. But where they are equally divided as to the guilt of one accused, though in certain aspects they may be agreed, the whole case as regards the accused is laid before the third Judge, and not merely the point or points on which there is a difference of opinion, and it is his duty to consider all the points involved before delivering his opinion upon the case.

THE appellant, Sarat Chandra Mitra, was the proprietor of the Pallichitra Press at Khulna at which was printed and published a vernacular monthly magazine called the *Pallichitra*. In its issue of Assar 1316 B.S. (June-July 1909) there appeared a poem entitled *Esho Ma Pallirani*, purporting to have been composed by one Nagendra Nath Chandra, a translation of which will be found in the judgment of Mookerjee J. On the 20th December 1909 the Superintendent of Police at Khulna, acting under the written authority of the Local Government, applied for, and obtained from, the District Magistrate of Khulna, a conditional order of forfeiture of the Pallichitra press, under s. 3 (1) of Act VII of 1908, on the ground that the same had been used to print the above issue of the *Pallichitra* containing the poem referred to, certain portions of which were alleged to amount to an incitement to murder and acts of violence. The appellant appeared before the District Magistrate and showed cause. The Magistrate after taking evidence made the order absolute on the 25th January 1910. The appellant thereupon filed the present appeal against the said order under s. 5 of Act VII of 1908.

The case first came on for hearing before Harington and Teunon JJ., and their Lordships delivered the following dissentient judgments:—

HARINGTON J. This is an appeal against an order made for the forfeiture of a printing press under Act VII of 1908.

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Three points are taken in appeal: (i) that the *Pallichitra* is not a "newspaper" under Act VII of 1908; (ii) that the poem is not proved; (iii) that it does not contain any incitement to the crimes mentioned in section 3 of the Act.

As to the first point, a "newspaper" is defined under the Act as meaning any periodical work containing public news or comments on public news.

The *Pallichitra* is shewn to be a periodical work. The issue before us contains some items of news as for example a report of the Khulna District Conference. It also reports as an item of news that a pleader, Srijukta Jamini Chatterji, received Rs. 200 from his employers which he handed over to the Conference. The *Pallichitra* clearly then comes within the definition of a "newspaper."

The next point that the *Pallichitra* was not proved at the hearing was not taken in the grounds when cause was shewn against the conditional order, and, moreover, the paper appears to have been duly proved.

The other point is more substantial. Section 3 of the Act provides that a Magistrate may make a conditional order forfeiting the press used or to be used in printing any newspaper containing "any incitement to murder or to any offence under the Explosive Substances Act, 1908, or to any act of violence," and the question is whether this article contains any such incitement.

The article is a poem, and the poem depicts in allegory India under the domination of the English who are portrayed as evil: it glorifies a rising against the ruling power by force and a destruction of the power of the British who are represented as demons. No doubt, if such a state of affairs came about, most probably murder, acts of violence, and perhaps offences against the Explosives Act, would ensue. But, nevertheless, I do not think that a poem expressing a glorification of a rebellion, or even a desire that there should be a rebellion and that it should be successful, is enough. It is calculated no doubt to excite feelings of hatred and disaffection, and to rouse in the minds of its readers a desire for revolution. But it does not in

my opinion go so far as to amount to "an incitement to murder, or to any offence under the Explosives Act, or to any act of violence." There must be something more direct and specific than what is to be found in this allegorical poem.

No doubt, the poem falls within the provisions of section 124 A, and if the Legislature had enacted that printing presses used for the production of seditious literature might be forfeited, the order of forfeiture would have been most properly made; but the law as enacted gives very limited powers of forfeiture, and only enables presses to be forfeited where they are used for the printing of newspapers which contain an incitement to particular crimes, or to a particular class of crimes.

In my view such an incitement of this nature is not to be found in the poem in question. In my opinion, therefore, the appeal should be allowed, and the order for forfeiture set aside.

TEUNON J. In this appeal I have had the advantage of reading the judgment just delivered by my learned brother, and, as on the first and second points taken in the appeal, I am in entire agreement with him, it is needless to add anything to what he has said on that part of the case.

The third contention urged on behalf of the appellant is that the article on which the Magistrate's order of forfeiture is based contains no incitement to murder or to any act of violence within the meaning of section 3 of Act VII of 1908.

The portion of that section material to the question before us runs thus:—"In cases where a Magistrate is of opinion that a newspaper contains any incitement to murder or to any offence under the Explosive Substances Act, 1908, or to any act of violence," such Magistrate may make an order in the terms of the section. Obviously this section does not extend to many writings which would fall within the scope of section 124A of the Indian Penal Code as tending to excite feelings of enmity and contempt towards the King or towards Government as by law established, but in construing the section it is to be borne in mind that it is to be read with the General Clauses Act (X of 1897), which in section 13 provides, *inter*

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*aliâ*, that words in the singular shall include the plural and *vice versa*.

Now the article under consideration is an allegorical poem entitled "Come Mother, Queen of the village" which appeared in the Assar number of the *Pallichitra* newspaper. The interpretation to be placed upon the poem has been the subject of full discussion before us both in this appeal and also in the appeal of the editor of the newspaper, one Bidhu Bhasan Bose, against his conviction under section 124 A of the Indian Penal Code in respect of the same poem. At the instance of the parties the two appeals were heard at one and the same time, and, for the reasons set out in our judgment in the appeal of the editor, we have come to the conclusion that the poem is an allegorical representation of India under British rule, and that in his references to the "crown," "the golden seat," "flames of fire," "weapons," "destruction of the power of the demons" and "oblations of blood" the writer desires to glorify a rising against the dominant power, and calls upon his countrymen, who are represented as at present steeped in cowardice, to arise and destroy those in whose hands the power now is by force and bloodshed. In other words, in my opinion, the poem in effect excites to armed rebellion and mutiny and, therefore, contains incitement to all the many acts of violence that necessarily accompany an attempt by force of arms to overthrow a strong established Government. Further, the writer, in fact, exhorts his readers to shed the blood of the present rulers of India, and of all who may seek to oppose them in their endeavour by use of force to substitute an Indian for the existing British Government.

With all deference to the opinion of my learned brother, the law does not, in my opinion, require anything more specific than this, and to hold that the incitement must be a direct incitement to some more defined, or some isolated act of violence, is in my opinion to limit the scope of the section and the usefulness of the Act in a manner not warranted by the language used. I should, therefore, dismiss this appeal.



Owing to this difference of opinion between their Lordships, the case was referred, under s. 429 of the Criminal Procedure Code, by his Lordship the Chief Justice to Mr. Justice Mookerjee.

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*Babu Narendra Kumar Bose and Babu Sachindra Prasad Bose*, for the Appellant.

*The Deputy Legal Remembrancer (Mr. Orr)*, and *Babu Atulya Charan Bose*, for the Crown.

MOOKERJEE J. This is an appeal under section 5 of the Newspapers (Incitement to Offences) Act of 1908, against an order absolute for forfeiture made under section 3, sub-section (5) of that Act. The appeal was heard in the first instance by my learned brothers Harington and Teunon, who have differed in opinion. My learned brother Harington is of opinion that the order for forfeiture must be set aside, while my learned brother Teunon is of opinion that the order for forfeiture should be maintained. The case has, therefore, been laid before me under section 429 of the Criminal Procedure Code read with section 9 of Act VII of 1908.

The circumstances under which the order absolute for forfeiture was made by the Court below are set out in the opinions recorded by my learned brothers, and need not be recapitulated at full length. It is sufficient to state that the order has been made on the ground that the *Pallichitra* is a "newspaper" within the meaning of the Newspapers (Incitement to Offences) Act of 1908, and that in the issue of it for Assar 1316 was published a poem "*Esho ma palli rani*" (এস মা পল্লী রাণী) which contains an incitement to murder or to an offence under the Explosive Substances Act, 1908, or an act of violence. The legality of the order of forfeiture has been questioned before me upon three grounds, namely, *first*, that the *Pallichitra* is now a "newspaper" within the meaning of the Newspapers (Incitements to Offences) Act, 1908; *secondly*, that the poem has not been duly proved; and, *thirdly*, that it does not contain any incitement to the crimes mentioned in section 3 sub-section (1) of Act VII of 1908.

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In so far as the first of these points is concerned, my learned brothers Harington and Teunon have held in concurrence with the Original Court that the *Pallichitra* is a "newspaper" within the meaning of the Act. After anxious consideration of the matter, I am constrained to adopt the view that the *Pallichitra* is not a "newspaper" within the meaning of the Act. Before I deal with the question, however, it is desirable to point out that the matter is open to discussion upon this reference under section 429 of the Criminal Procedure Code. That section provides that when the Judges composing the Court of Appeal are equally divided in opinion, the case with their opinion thereon shall be laid before another Judge of the same Court, and such Judge after such hearing, if any, as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion. Two points are worthy of note in connection with this section: *first*, that what is laid before another Judge is the "case," and, *secondly*, that the judgment or order follows the opinion delivered by such Judge. I am not now concerned with the question of the trial of two prisoners with regard to one of whom the Judges composing the Court of Appeal may be agreed in their opinion, while as regards the other the Judges may be equally divided in opinion. In such a contingency it is quite possible to maintain the view that, upon a reasonable interpretation of the term "case," what has to be laid before another Judge is the case of the prisoner as to whom the Judges are equally divided in opinion. I am now concerned only with the contingency in which the Judges of the Court of Appeal are equally divided in opinion upon the question of the guilt of one accused person, though upon certain aspects of the case they may be agreed in their view. In such a contingency, what is laid before another Judge, is, not the point or points upon which the Judges are equally divided in opinion, but the "case." This obviously means that, so far as the particular accused is concerned, the whole case is laid before the third Judge, and it is his duty to consider all the points involved, before he delivers his opinion upon the case. The judgment or order follows such opinion

which need not necessarily be the opinion of the majority of the three Judges; for instance, at the original hearing of the appeal, one Judge may consider the prisoner not guilty, another Judge may consider him guilty under one section of the Indian Penal Code, and liable to be punished in a certain way; the third Judge may find him guilty under a different section and pass such sentence as he thinks fit. It is this last opinion which prevails, subject to the provisions of section 377 of the Criminal Procedure Code in the case of confirmation of sentences of death. The question, therefore, whether the *Pallichitra* is or is not a "newspaper" within the meaning of the Act, is one of the matters which I am bound to take into consideration. Now the term "newspaper" is defined in section 2, sub-section (1), clause (b) of Act VII of 1908, to mean "any periodical work containing public news or comments on public news." This definition, therefore, involves two elements, one of time of publication, the other of subject-matter; in other words, the term "newspaper," as defined in the Act, involves the idea of periodicity, as also the fact that what is contained in the paper is public news or comment thereon. The definition, in my opinion, ought to be read as whole, and in order to determine the true character of a publication and to enable us to answer whether it is a "newspaper" within the meaning of the Act or not, we must ascertain whether the work is periodically published and contains public news or comments thereon. It is not enough to take a single number and to pick out an isolated sentence or paragraph therein which may, by stretch of language, be interpreted to contain public news or comment thereon. In some cases, the character of a paper may be so manifest as to make it incontestable that it periodically publishes public news or comments thereon, and is consequently a "newspaper" within the meaning of the Act. The case before me is, however, of an entirely different description. The *Pallichitra* is obviously a monthly magazine and critical review, but it is sought to be brought within the definition of "newspaper" because, in one particular issue of it, sentences or paragraphs are to be found, which may by some stretch of

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language be deemed to contain news. In my opinion, when it was disputed that the *Pallichitra* was not a "newspaper," the prosecution ought to have established its alleged character by proof of the contents of more than one issue of the paper. In other words, to bring a case under sub-section (1) of section 3 of Act VII of 1908, the character of the offending paper, as a "newspaper," has to be first established, and this obviously may not always be possible by production and proof of the contents of one issue only. It is conceivable that the matter complained of may be contained in an issue of what is unquestionably a "newspaper" (that is, which periodically publishes news or comments on news), though that particular issue may not contain any item of news: the converse case is equally possible in which objectionable matter is contained in what is obviously not a "newspaper" and the mere fact that in that particular issue an isolated sentence or paragraph may be found which may be interpreted to contain public news or comments thereon does not make the publication a "newspaper." I feel no doubt whatever upon the materials on the record that it is a misuse of language to say that the *Pallichitra* is a "newspaper" within the meaning of Act VII of 1908. One might as well take an issue of the "Nineteenth Century" or the "Contemporary Review," pick out a solitary passage or paragraph which may be interpreted to contain public news or comment thereon, and then maintain the position that the periodical is a "newspaper." The case before me manifestly discloses an attempt to extend the operation of the provisions of the Act to cases of papers to which they were never intended to be applied by the Legislature, in so far as such intention may be gathered from the language used in the statute. The first ground urged on behalf of the appellant must consequently prevail.

In so far as the second ground urged on behalf of the appellant is concerned, it may, in one sense, be treated as unsubstantial as the point does not appear to have been taken when cause was shown against the conditional order. But I may observe that the case does appear to have been conducted

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in the Original Court with a certain amount of laxity, and the poem as also the paper were not regularly proved as they ought to have been. In cases of this description, it is essential that the proceedings should be regularly conducted and the requirements of the law ought not to be ignored as idle forms. It is not necessary, however, to deal further with this aspect of the case, as the order of forfeiture must be set aside on other grounds.

In so far as the third ground argued on behalf of the appellant is concerned, it raises the question whether the poem contains any incitement to murder or to an offence under the Explosive Substances Act, or to an act of violence. The poem has been translated by one of the officers of this Court as follows :

“Come, Oh Mother Queen of the Village, the day is drawing its full length to a close. Let the children rise up with bounding hearts, hearing thy great voice. I have sacrificed my life to take away the crown of victory from the enemy’s brow, and decorate thee, thou Queen of Queens with it in the battle of life.” “Led by mistaken ideas, and tormented by passion, I did not perceive and could not feel at heart when (thy) golden seat disappeared.”

“Now the charming calls come pervading all through Bharat (India), and in the new light I see thee at the entrance of the “Temple of Heart.”

“Under the stamp of Asur’s (Gods’ adversaries) feet there are no Parijat flowers in the Nandan Gardens, and in the garb of a beggar, Indrani (the Queen of the Heavens) is sorely suffering in the inmost recess of her heart.”

“The Suras (Gods) who have conquered death see all this before them, and like cowards shut up their eyes for hatred and shame. O Mother, I do not know when for the swadesh the Gods will rise up in a body, and burning with rage as fierce as the world destroying fire kill the force of their adversaries, and relying on their own strength, and taking up their own arms, re-establish the throne of the Heavens by offering drinks of blood to the manes.”

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"The six passions have, like the adversaries of Gods, come mastering over my heart and taken their seats at the (very) entrance to drown the Temple of Heart into the abyss of sin."

"But what fear has he whose mother is the giver of redemption. For if she be enshrined at heart, all shackles withdraw."

"Allured by passions and repressed by mistaken ideas, I so long remained forgetful; and when, O Mother, you came and found (my) heart shut against thee, you went away slighted. This stinging pain of bondage, more due to that sin, is burning in my heart. Is it after seeing this that you are calling us to dispel the intoxicating influence of mistaken ideas (over the heart.)"

"Hearing thy calls and benedictions, and getting a new life, I have come with my heart to offer it as a sacrifice for your worship. I have brought my heart to install thee in it. So Mother, Queen of the Village, come and accept my heart for your seat, tinged as it is with blood."

There has been some discussion at the Bar as to the true meaning of the poem. On behalf of the appellant it has been contended, that it is an allegorical representation of the struggle between town life and country life; while on behalf of the Crown it has been urged that it is an allegorical representation of India under British rule. That the poem, interpreted literally, makes no sense in many places is obvious to any reader of the original. I think it indisputable that it has a metaphorical meaning, and that it is intended by an innuendo to describe what the author deems to be the condition of India under British rule. But the question which I have now to consider is not whether it justifies a conviction under section 124A of the Indian Penal Code, but whether it contains an incitement to the offences mentioned in section 3, sub-section (1) of Act VII of 1908. I have carefully read the poem, and I am unable to hold that it contains any such incitement. The passage upon which reliance has been principally placed on behalf of the Crown is that in which the writer states that



he does not know when the Gods will rise up in a body, and, burning with rage as fierce as the world-destroying fire, kill the force of their adversaries and re-establish the throne of the heavens by offering drinks of blood to the manes. It may be assumed that this embodies a thinly veiled glorification of rebellion, and implies a desire on the part of the writer that there should be a successful rebellion. But this is clearly not sufficient to bring the case within sub-section (1) of section 3. I agree with my learned brother Harington that there must be something more direct and specific than what is to be found in this allegorical poem to sustain an order absolute under the statute. The expression "incitement" clearly implies the idea of rousing to action, instigation or stimulation, and as the Act expressly states, the incitement must be to murder or to an offence under the Explosive Substances Act or to an act of violence. If the use of seditious language, sufficient to bring a case under section 124A of the Indian Penal Code, was equivalent to an incitement to the offences mentioned in section 3, subsection (1) of Act VII of 1908, the Legislature might appropriately have framed the section in very different terms. In my opinion, section 3, subsection (1) as framed, confers very limited powers of forfeiture, and I agree with my learned brother Harington that it is applicable only to the cases of presses used for the printing of newspapers which contain incitements to the particular crimes or classes of crimes specifically mentioned in that section. The third ground urged on behalf of the appellants must, therefore, prevail.

The result is that, in concurrence with my learned brother Harington, I hold that the appeal must be allowed and the order for forfeiture set aside.

*Appeal allowed.*

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## APPELLATE CRIMINAL.

Before Mr. Justice D. Chatterjee and Mr. Justice Richardson.

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v.

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*Sedition—Wholesale imputations of bribery against ministerial and police officers and of neglect on the part of Government to inquire into such abuses—Attempt to promote enmity between different classes—Inteighing against Hindus and Mahomedans alike—Penal Code (Act XLV of 1860), ss. 124A and 153A—Convictions at one trial under ss. 124A and 153A of the Penal Code—Appeal to the High Court—Criminal Procedure Code (Act V of 1898) ss. 35(3), 408 prov. (c).*

A single expression that the people of Bengal are trodden under the feet of outsiders used incidentally in a newspaper article, otherwise innocuous, does not constitute the whole seditious.

An article imputing wholesale bribery to the ministerial officers of the Law Courts and to the lower officers of the police force, and expressing grave doubts as to whether the Government ever inquire into such abuses, so much is it occupied with investigations of boycott, dacoity and sedition, published when sedition is rife and the minds of people excited, may have the effect of creating a feeling that the Government is not doing its duty, and exceeds the limits of fair comment and is seditious, irrespective of the question of the truth of the allegations.

Where the writer of an article inveighed both against the Babus and Meahs as professing brotherhood with the poor Mahomedan ryots and then robbing them, and referred to the alleged conduct of Christian missionaries towards their converts, by way of illustration, without any deliberate attempt to excite one class against another, the conviction under s. 153A of the Penal Code was set aside as bad in law.

*Per RICHARDSON J.* If a particular article is charged as being seditious, on the ground that it says more than appears on the face of it, it is the duty of the prosecution to show that it has, in fact, the guilty meaning or intent attributed to it.

*Semle:* An appeal lies under ss. 35 (3) and 408, prov. (c), directly to the High Court from a conviction and separate sentences under ss. 124A and 153A of the Penal Code passed on the same trial.

\* Criminal Appeals, Nos. 509 of 1910 and 746A of 1910, against the order of J. McSwiney, Offg. District Magistrate of Rangpur, dated May 26, 1910.

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THE appellant, who was the editor and proprietor of the *Rangpur Bartabaha*, a local newspaper, was tried, with Surendra Prosad Lahiri, the declared printer and publisher of the same, before Mr. J. McSwiney, Officiating District Magistrate of Rangpur, under ss. 124A and 153A of the Penal Code, and convicted thereunder, on 26th May 1910 and sentenced under each section, the first to five years' and one year's rigorous imprisonment, respectively, and the second to six months' rigorous imprisonment. The appeal from the conviction under s. 124A was filed in the High Court, and that from the conviction under s. 153A in the Court of the Sessions Judge of Rangpur, but the High Court transferred the latter to itself under s. 526 of the Criminal Procedure Code.

The charges under ss. 124A and 153A of the Penal Code related to three articles entitled "*Pratihar*" or redress of public grievances, "*Bijoya*," or the ceremonial farewell to the goddess Durga, and the "*Sipahir Katha*," or the talk of the sipahi, and published in the issues of the *Bartabaha*, dated the 10th September, 12th and 26th November 1909, respectively. The Crown also filed six other articles or poems appearing in other issues of the same paper in September and October, to show its general tone, one of which was called "*Anandamayir Agaman*" or the coming of the Blissful One.

The article "*Bijoya*" was the rhapsody of a devout soul addressed to Durga, and contained the following passage as translated by Debendro Kumar Bannerjee, the Head Translator to the Government of Eastern Bengal and Assam:—

Mother, the reliever of sorrows, every year do you appear for three days in this crematorium of a city for the purpose of ensuring protection to your children. It is difficult to ascertain, mother, how many Bengalees were killed by the pest you produced in the shape of a terrible cyclone when you came down this year. It was to teach a lesson to your children that are destitute of knowledge, devotion and observance (of religious ceremonies), and weak and trodden under foot by the outsiders. What lesson of yours is this, mother!

The "*Pratihar*" was translated by the same as follows:—

Prayer for redress (of grievances) is made before the British Government by lamentations, requests and supplications through newspapers. But, far from real redress, it is a matter of grave doubt

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whether Government take any measures at all to find out the real truth. The Magistrate, the Commissioner, the translator, all of them read newspapers. Besides it is not a fact that at least one or two extraordinary scholars of the Police Department—scholars who seem to consider themselves as having eaten the salt of the Government—do not read them. How is it then that there turns up no redress? To this we shall reply that everybody from the British Raj down to a (menial) servant and chaukidar is worked to death in putting down three things, viz., sedition (treason), the checking of the purchase of *belati* articles, and dacoity. Consequently, (the) vigilance (exercised) in any other matter happens to be very little. We know that one or two extraordinary scholars of the Police (Department), some Kotwal or Court (Sub-Inspector) Babu gather the sum and substance of a newspaper and read (it) to the Police Superintendent, (presumably) a great scholar; and, forthwith, permission is (sought) for the institution of a suit, and instantly, too, preparations and earnestness are manifested of sweeping (the people of) the Province away by a flood of (the river of) sedition.

Do what you like, we do not wish to speak a word about it. But how is it, oh, Government! that resorting to your Courts of Justice means that you have to be propitiated with the present of court-fees. Redress, even though provided by law, is very difficult of attainment: it fails to give you the present. Let that too pass. Giving you that present means that the giver has to make presents to all your officers, such as the nazir and the like. You are constantly hearing of this present through the medium of newspapers, but have you remedied it? Of course, you will say "we can remedy it" on the strength of the evidence alone, is not it? Wherefrom does the evidence in a case of sedition come? . . . If anybody asks "why do you give unlawful (present of) money at all in this way?" To this we shall reply: "A man cannot have the power of deciding as to who is the best ojha (exorcist) when the snake has (actually) bitten, when in fear of snakes one must needs worship Manasa (the goddess of snakes). Hundreds of people are every day harassed into offering such money in every town: if the owner of a bullock cart does not offer any present at the feet of the sepoys, they will contemptuously ignore a thousand arguments, give him a sound beating, and, lastly, impress him. The pretext, too, of having committed nuisance in roads and rivers is not inconsiderable. It enables the chaukidar who has assumed the position of a saheb (European) to meet his bazar expenses. Untold are the kind of presents that have to be given by one who wants to have a document registered. If no remedy is available for all these matters, the Government had better make a rule that, whenever a Government sepoy is come across, some money must be paid to him as a tribute of respect to Government. We will give, destined as we are to only give. But say, once for all, how much to whom is to be given, so that the belly may have its fill. It is sedition and dacoity alone, Government, that you have taken notice of. Why is there no remedy for

gambling, which, though prohibited by law, has been going on everywhere. Thanks to these presents. Mention may be made of many such matters (but) what will be (gained) by (our) doing (so). How many thefts and how much bribery are going on in a prison, in a hospital, in a charitable dispensary. But who would take notice of them? Who would remedy them? . . . . .

Our only prayer at present before the Government is that it will try not only to get itself informed of the above matters by holding a secret enquiry, but also to redress the same. On the other hand, our prayer before society is that persons despicable in the eye of reason and morality be adequately punished by excommunication, otherwise the country will be burnt to ashes by the fire of unrest and oppression.

The English will laugh at your prayer of this kind. They will say that "we are so worthless and mean that we are publishing (the acts of) immorality (of persons) of our race, and are holding up the same before the gaze of outsiders (foreigners)." But what else we can do? You (Europeans) are seated laying such a trap that we are forced to cast aside our pride and politeness, are at our wit's end, fall into your snares and catch hold of your feet. You are the teachers, and we the disciples. Hence this our condition. . . . ."

The following is the official translation of the "*Sipahir Katha*":—

"We shall tell a tale to-day, and relate a story of two sepoys, one a Hindu, and the other a Mahomedan. They are two sepoys of the Government and at the same time well-wishers of the country. . . . . They asked us many questions about the *swadeshi*, and we replied. But, instead of being pleased with our answers, they made refutations. We thought that when we had told them news of the Parliament, of his Excellency the Governor-General of India, of great men of our country, when we told them who attacked His Excellency, and who made an attempt on the life of His Honour the Lieutenant-Governor, and, lastly, when we told them also of the nine Bengali virtuous men who had been deported, of Madan Lal Dhingra, Khudiram, Arabindo, Barin and others, too, we had told them satisfactorily, and we thought that we had much strengthened their determination in favour of *swadeshi*; but, by Jove, we stood speechless when we heard what they said (in reply). We realised that all people were not willing to listen to our (empty) vociferation; that all our words were mistaken. "Babu," said the sepoy: "most of you are thieves. You will serve under the Government, and fill your stomachs: how shall you then serve your country? Whenever we approach you for employment, you ask for money (as bribes). It is your habit to earn money by disreputable and unfair means, by making reason look like a fallacy, and fallacy a reason—if you could only get it (money). . . . . We said: "Whatever difference" they may exist between us in our wordly or professional matters, you and we should stand shoulder to shoulder while serving the country forgetful of those differences. Whatever we Hindus and Mahomedans may be, we are brothers. Though

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we (Hindus and Mahomedans) observe widely different customs, should we, or can we, keep silent when someone comes forward to insult our mother—simply because we are Hindus and you are Mahomedans. Fie upon your life, fie upon your vow, and fie upon our relationship as brothers if we suffer our mothers to shed tears in our presence over either insult or starvation or want.” “Quite so” said the sepoy. “Fie upon your life and fie upon your works. You agitate and exult only in words, and say that a Mahomedan is your brother, but do you do so actually indeed? It is you that cause litigation in the country and absorb the money of the Mahomedans. It is you that are pleaders and mukhtears: it is you again that in going to rescue the poor Mahomedans from litigation throw them into the danger of *Kumbhipaka* (a hell, a caldron, in which oil is being constantly boiled, and into which attendants of death throw those persons alike who try to improve their own physique upon the flesh of other beings). Poor cultivators dispirited and starved for want of money are making piteous lamentations at your door. Do you ever glance at them? And if you show kindness at first, you take compound interest, bring ruin upon them, break down their houses and at last build palaces in your own homestead.” The Hindu sepoy at a loss to find any other (plea) said “when we go to the Babus (Hindu gentlemen) for having a petition written, they demand a sum of eight annas at once. . . . When we, poor servants, take any bribe (lit: two pice), you would at once send correspondence to a newspaper, bring it to the notice of the authorities (saheb) and ruin us altogether. But when the Europeans (authorities) take bribes by hundreds, you cannot have a word to say. . . .” We asked whether the Hindus alone were blamed in this respect. “No,” they replied, “both the Babus and the Meahs (Maulvies) are. Almost all of the educated people have forgotten cultivation and the like, they shrink from labour and have taken to this means. If the English Government ceased to exist, how would you pose as Babus or Meahs (enlightened Hindus and Mahomedans), be you Hindus or Mahomedans. How shall you take bribes? . . .” “How can we expect ever to be able to act in concert with you? We shall unite with you in a vow of patriotism only when you will look upon yourselves with those eyes with which you do upon ourselves. It is then the vow of *swadeshi* will be fulfilled. Gentlemen may be ideal men, but what can a handful of Babus and Meahs (enlightened Hindus and Mahomedans) do, if they do not secure the loving co-operation of peasants like ourselves? You can do real work only when the Hindus and Mahomedans, high or low, will behave in reality like brothers, as you say they are brothers, otherwise you will play the rôle of the clergymen who say ‘you were created by God, you are my brothers. Come brothers. Let us have faith in Jesus Christ and you will be happy.’ As soon as a Bengali is converted to Christianity, the saheb employs him in the kitchen or the garden on a monthly pay of Rs. 5, and soon after the old, long-cherished feeling of contempt for the dark-skinned fellows is roused for ever. Just as a Christian missionary can derive

no benefit from a Christian of this kind, so also gentlemen can derive no benefit from a person who has been turned *swadeshi* by sheer lectures." After the sepoys delivered themselves of this speech, we learnt that they never used any but *swadeshi* articles. Instantly that we were delighted with this news we said: "You are *swadeshites* then. Our interest being identical, it signifies little if we disagree in other matters." At this the sepoys said: "Do you, then, want to be *swadeshites* by using country-made cloths and sugar and killing a few (literally two) Englishmen?" "Don't you want what is so necessary, viz., the strength of unity or any work that will be productive of real good to the country? This is what is known as the strength of union," said we. The sepoys now retorted in a tone of pride: "We do not want Babus to argue with you. Sleep (eye) peacefully with your *swadeshi*. . . ." From what we heard we realised that the two sepoys were true *swadeshites*, and that we were selfish and low-minded miscreants who practised hypocrisy under the pretence of furthering the cause of the country. . . .

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Mr. P. Mitter, Mr. K. N. Chaudhri, Babu Bhudeb Chandra Roy Chaudhry and Babu Naresh Chandra Sen, for the appellants.

Mr. Donogh and Babu Atulya Chandra Bose, for the Crown.

CHATTERJEE J. These two appeals arise out of a prosecution of the prisoner under sections 124A and 153A of the Indian Penal Code. The appeal against that part of the conviction which was under section 124A was filed in this Court, and the appeal regarding the conviction under section 153A was filed in the Sessions Court. We have called up the appeal regarding the conviction under section 153A from the Sessions Court for trial by this Court under section 526, and heard both the appeals. Under section 35 (3), if a person is convicted of several offences at one trial, the aggregate sentences are to be deemed as one sentence for the purpose of appeal. As the prisoner was convicted under section 124A and sentenced to two years' rigorous imprisonment under that section, and also under section 153A and sentenced to one year's rigorous imprisonment under that section, the aggregate sentence of three years should be considered as one sentence for the purpose of appeal, and as section 408, proviso (c), provides

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that a person convicted under section 124A has an appeal direct to the High Court, it is a reasonable inference that the appeal against the single sentence of three years under both the sections should lie to the High Court. It is, however, not necessary to decide this point in this case, as the appeals were separately filed and they have been virtually unified.

It appears from the judgment of the learned Magistrate that the prisoner was previously convicted under the same sections and underwent imprisonment for one year for the same. We have been unable to find the judgment in that case, and do not know enough of the circumstances to allow us to consider it in connection with the question of sentence.

The prisoner was charged with the offence of sedition under section 124A in respect of three articles published in the *Rangpur Bartabaha*, a local newspaper of the district of Rangpur. The articles are named: (i) "*Pratikan*" or redress (of grievances), (ii) "*Bijoya*" or the ceremonial send-off given to the goddess Durga on the fourth day of the Puja, (iii) "*Sipahir Katha*" or the talk of sipahis, being a report of an imaginary conversation between the writer and two sipahis.

These articles were translated by the Government translator of Eastern Bengal, and I have read and re-read the originals and the translations to see how far the latter present an honest and fair rendering of the sense of the former. I find that in some, at least, of the objectionable passages, the learned translator has overcharged or overcoloured. For instance, he translates *khair khah*, which is a well-known Persian word now adopted into the Bengalee language, as "eater of salt," although it means a "well-wisher" and nothing more. He explains in cross-examination that as a Sanskrit scholar he tries to derive every word from the Sanskrit, and therefore, he would derive this word from खार् खद् khwar=ashes=salt, and khad=to eat. This is absurd and ridiculous, and any school-boy can tell him that. Then he translates *pishacha* as "eater of raw flesh." The origin of the word may be from the word *pishitasa*, which derivation is only conjectural, but the word is never used in this its supposed etymological sense. Pro-

fessor Macdonell, of Oxford, gives the etymological meaning as "moving brilliantly, the will o' the wisp," and the meaning as a kind of "demon." If the object of a translation is to give the meaning in which a word is understood by the people who use the language as their mother-tongue, this translation of the word *pishacha* is simply absurd. The word "daughter" is said to be derived from a root meaning to "milk," and etymologically would mean a "milker;" if in translating the sentence "Ram's daughter said so," one renders it into "Ram's milker, said so," he would convey a different meaning altogether from what was intended to be said. So in translating *ripurtarana* in the article "*Bijoya*" he renders it as "by the oppression of the enemy," whereas in the context in which these words occur the meaning cannot but be "by the force of the passions" (মা বঙ্গের সেই নিকাম ধর্ম এখন কামনার বশে বিহ্বল ভাবাপন্ন হইয়াছে) He translates this: "Mother, that end-in-itself religion of Bengal (a religion that seeks no means to an end) has now been ill at ease under the impulse of carnal desires." This does not at all convey the sense of the sentence. নিকাম ধর্ম is, duty for duty's sake, doing good works, because they are good, without any desire for praise in this world or reward in a future existence. The translator has mistaken কামনা for কাম and translated it as "carnal desire," whereas it is only "desire," meaning "desire for the good of this world." The word বিহ্বল is evidently a misprint for বিকৃত, but the learned translator has translated it as "ill at ease" as if the word were বিস্থিত. No such word as বিস্থিত is possible in the Sanskrit or Bengali language, and বিকৃত means "deformed, modified for the worse, degenerated." If the sentence is capable of being translated, it means "Mother, the old state of faith in which good works were done for their own sake, and not for securing a good name in this world or happiness in future, has now degenerated by the intervention of desires for the goods of this world." The word *Chandika* is rendered both by Wilson and Macdonell as the goddess Durga, but the learned translator

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renders it as "*Fury*," as if there were any analogy between the Furies of Greek mythology and our *Chandika*. This translation appears to me to be almost perverse. The learned Magistrate has very fairly admitted that some of these translations were incorrect. He cannot, however, be expected to understand the full sense of the Bengalee articles, and I have no doubt the mistranslations have to some extent influenced him against the prisoner. Going into details upon the three articles, I find there is absolutely nothing objectionable in the article "*Bijoya*." It is the rhapsody of a devout heart on the termination of the religious festivities of the Durga Pujah. The goddess is invoked not to inflict calamities like the cyclone of October last on the country, but to come the next time in her world-fascinating Durga form, *i.e.*, with the goddesses of wealth and learning, with the gods of protection and success surrounding her. It deplores the degeneration of faith and calls upon her to give them the power of uniting in her worship without envy, malice or malevolence. The key to the seditious trend of the article is found in the word **পরপদদলিত** as a description of the sons of Bengal; literally the words mean "trampled under the feet of others": it really signifies a conquered nation, and the figure of speech used is immaterial. Reading the article even with the light of the comment of the learned Magistrate and the learned Counsel for the Crown, I am unable to consider that this article was an incitation to the people to unite for overturning the British Government and the article "*Anandamoyir agaman*" does not throw much adverse light.

The same thing cannot, however, be said of the other two articles. Although the sense is considerably disfigured by the mistranslations, there is one idea clear as running through the two articles, that the Government does not care for ascertaining the real truth about grievances which exist, especially about the administration of justice. The first article, the "*Pratihar*," says that bribery in some form or other is rampant in the Courts of Justice, barring of course the judiciary who are beyond suspicion, and, therefore, poor. The writer, therefore,

prays that a secret Commission might be appointed by Government for investigating the truth of the allegations, and asks society to excommunicate such ignoble bribe-takers. The sting of the article, however, lies, according to the prosecution in the concluding statement, that "Englishmen will laugh at such a request (for a Commission to enquire into the bribery prevalent in courts, etc.), and say these people are so worthless that they expose the failings of their own countrymen to the scrutiny of others," but the writer says: "You have laid such a trap that we must disregard all questions of dignity and honour, and fall into them; you are the teachers, we are the disciples." Literally read the word "trap," as applied to a judicial system is objectionable, but stripped of the figure of speech it means a "complicated system," and the writer means that people cannot help giving bribes, because otherwise they would not have their work done at all or done promptly. This is the article "*Pratihar*" or redress of grievances. The learned Magistrate has misunderstood the meaning of the sentence "the English will laugh, etc." I do not see in this sentence read with its context any intention in the writer to excite feelings of hatred on the part of the Indian subjects of the Government towards its English subjects.

The next article is the "*Sipahir Katha*." This article contains a severe diatribe against *swadeshi* agitators of the lawyer class. The sepoy says: "You Baboos and Meahs, *i.e.*, educated Hindus and Mahomedans, owe your existence as such to the British Government, in whose Courts you act as amla and take bribes, or as pleaders and muktears, in which capacity you foster litigation, and then suck the life blood of the poor cultivating class who fall into your clutches. Your agitation for the *swadeshi* cause cannot attract the poor classes to the same. We cannot join your *swadeshi* cult so long as you do not look upon us in the same light in which you look upon yourselves. You call us brothers simply for making us join with you, but all the same you do not cease to treat us hatefully whenever you can, just as the Christian missionaries make converts by calling them brothers, and after conversion

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treat them with contempt. The learned Magistrate might have accepted the defence theory that no mischief was meant, and that the sepoys only taunted the Baboos with their wrong methods of serving the country by boycotting foreign goods, and murdering some officials, and recommended a real brotherhood for the good of the country. To my mind the article is intended to expose the so-called *swadeshi* agitators, and condemn not only their methods of boycott and terrorism, but also the insincerity of their professions of brotherhood to those whose blood in the shape of hard-earned money they are said to be sucking and feeding themselves fat upon.

The commentary of the learned Magistrate upon the words "*swadeshi desh*" is wholly erroneous, and this error is due to his not fully understanding the language and being without the aid of the translator, who said there was no sense in it. I wonder how the learned translator said so. The words are ইহার সরকারী সিপাহী অথবা স্বদেশী-দেশের-হিতাকাঙ্ক্ষী. The hyphen mark after স্বদেশী is not a hyphen connecting the words "*swadeshi*" and "*desh*." It is a *dash* meaning, "that is to say," i.e., "*swadeshi*, that is to say, well-wishers of the country." This is the most obvious reading of the sentence, and I wonder the learned translator was non-plussed.

The sin, however, of these two articles is that they impute wholesale bribery to the ministerial officers of Courts and to the lower officers of the Police force, and express grave doubts as to whether Government ever enquire into the truth of the grievances, so much is it occupied with investigations of boycott, dacoity, and seditious matters. If these aspersions have the effect of bringing into hatred or contempt the established Government of the country, or serve to create feelings contrary to affection to the Government, we need not stop to enquire whether any part of them is true. To my mind these aspersions against the Government may have the effect of making people think that the Government is not doing its duty, and is not, therefore, a good Government. I think they go beyond fair comment, and, written at a time when the seeds of sedition are being sown broadcast and the minds of people

are under excitement, they cannot be taken to have been actuated by honest and loyal motives. I think, therefore, that, under the circumstances of the case, the conviction of the prisoner under section 124A is right. The articles are, however, more or less "crazy," and the sedition is only indirect: and I think a sentence of six months rigorous imprisonment will serve the ends of justice. As regards his being the editor, all doubt is removed by his use of the editorial "we" in respect of his last imprisonment.

The offence under section 153A is not so clear, as there does not seem to be any deliberate attempt to incite one class against another. The sepoys inveigh both against *Babus* and *Meahs* as robbing the poor Mahomedan ryots, and the reference to the missionaries is a foolish illustration not intended to create enmity between the missionaries and any other subjects of the King. The conviction under this section must, therefore, be set aside. This disposes of both the appeals by the prisoner.

RICHARDSON J. I have had the opportunity of reading my learned brother's judgment, and concur with him generally in the conclusion at which he has arrived.

In regard to the article "*Bijoya*," the only word to which objection can fairly be made is "*para-padalita*" (trodden under the feet of strangers), which, if intended to be so applied, is not a just description of the condition of the people under the Crown. But in the context, in which it occurs, I agree that this one word is not sufficient to make the article seditious. No doubt references to demons, whether they be the allegorical demons of passion or the embodied demons of mythology, sometimes cover attacks of a political character. But if a particular article is charged as being seditious, on the ground that it says more than appears on the face of it, it is, of course, the duty of the prosecution to show that it has, in fact, the guilty meaning or intention attributed to it. In the present case the proof of any such intention appears to fall short.

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As to the two articles "*Pratihar*" and "*Sipahir Katha*" I agree that the sweeping and unqualified character of the imputations which they make against the administration of affairs in this country, leaves no doubt that they were intended to stir up feelings of disaffection towards the Government established by law, and that in respect of these two articles the conviction of the appellant under section 124A of the Penal Code should be affirmed. The conviction under section 153A certainly rests upon a much more slender foundation. I may add that, in considering these articles, I have fully accepted my learned brother's authoritative opinion in regard to certain expressions, the meaning of which has been the subject of controversy. The District Magistrate did his best, on the evidence before him, fairly to appreciate the effect of the articles, and, in regard to two of the controverted expressions (*khair khah* and *ripur tarana*), he adopted the translation suggested on behalf of the defence, and now found to be correct. He may, however, have been led into taking a more serious view of the effect of the articles as a whole owing to some misconception as to the meaning of particular expressions used in them other than the two above referred to. This is more especially true of the article "*Bijoya*" which, from its religious and impassioned character, is the most difficult of the three articles to interpret. But it is also true in respect of the words *swadeshi-desh*, which occur in the article entitled "*Sipahir Katha*."

With these brief observations I accept the orders which my learned brother proposes to make on these appeals.

E. H. M.

APPELLATE CRIMINAL.

Before Mr. Justice D. Chatterjee and Mr. Justice Richardson.

SURENDRA PROSAD LAHIRI

v.

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Sept. 8.

Sedition—Liability of declared printer and publisher of a newspaper for seditious matter appearing therein—Absence during the period of the publication of the seditious articles—bona fides not made out—Printing Presses and Newspapers Act (XXV of 1867) s. 7.

The declared printer and publisher of a newspaper containing seditious articles is responsible for them unless he makes out, on sufficient evidence, that he had in fact nothing to do with them.

Where the editor of a newspaper was convicted and sentenced under s. 124 A of the Penal Code, and the accused made his declaration as printer and publisher thereafter, and continued so to act after the editor had resumed work on release from jail, and further allowed his name to appear as such, though he was absent from the town of publication of the paper when certain seditious articles appeared therein, and engaged during the period in his own private business without taking any interest in the paper, it was *held* that he had not made out the *bona fides* of his absence, and was, therefore, legally responsible for the articles.

THE appellant was the declared printer and publisher of the "*Rangpur Bartabaha*," having made his declaration under the Printing Presses and Newspapers Act (XXV of 1867) on the 16th June, 1908. It appeared that Joy Chandra Sarkar, the editor of the paper, was convicted under s. 124A of the Penal Code and sentenced to one year's imprisonment on the 22nd December, 1907; after his release from jail, however, he resumed his work as editor. The appellant left Rangpur on the 28th August, 1909, and returned on the 29th November. During this period he was engaged in his own business as a photographer and general dealer elsewhere. He did not

* Criminal Appeals, Nos. 497 and 746 B of 1910, against the order of J. McSwiney, Offg. District Magistrate of Rangpur, dated May 26, 1910.

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take any interest in the paper, but his name still appeared therein as its printer and publisher. He was tried with the editor, Joy Chandra, under ss. 124A and 153A of the Penal Code in respect of the same articles, under the circumstances mentioned above* and was convicted and sentenced, on the 26th May, 1910, to six months' rigorous imprisonment under each section. He filed an appeal from his conviction under the former section in the High Court, and his appeal to the Sessions Judge of Rangpur, in respect of the conviction under the latter section, was similarly transferred to the High Court.

Mr. P. Mitter, Mr. K. N. Chaudhuri, Babu Bhudēb Chunder Roy Chowdhry and Babu Naresh Chunder Sen, for the appellant.

Mr. Donogh and Babu Atulya Charan Bose, for the Crown.

CHATTERJEE AND RICHARDSON JJ. The prisoner was the declared printer of the "*Rangpur Bartabaha*," and he has been convicted of offences under sections 124A and 153A of the Indian Penal Code in respect of the same articles *Pratīkar*, *Bijoya* and *Sipahīr Katha*, in respect of which the editor, Joy Chandra Sarkar, has been convicted. We have held in the appeal of Joy Chandra (1), that the article *Bijoya* is harmless, or at all events not seditious, but that the articles *Pratīkar* and *Sipahīr Katha* are seditious in the sense of containing wholesale denunciations of the administration of Justice in India. The prisoner being the declared printer would be responsible for the said articles unless he can make out, on sufficient evidence, that he had in fact nothing to do with them. The *Pratīkar* appeared on the 10th of September, 1909, and the *Sipahīr Katha* on the 26th of November, 1909. The learned Magistrate finds on the evidence that he was absent from Rangpur on these days, and it is argued that the knowledge of these articles must, therefore, be brought home to him before he can be convicted. It appears, however, that

* See *ante*, p. 214.

Joy Chandra went to jail on the 22nd December, 1907, and the prisoner gave his declaration on the 16th June, 1908. Joy Chandra came out of jail on the 22nd December, 1908, and evidently resumed his work. The prisoner left Rangpur on the 28th August, 1909, and the *Pratihar* appeared thirteen days after. The prisoner came back to Rangpur on the 29th November, 1909, and the *Sipahir Katha* appeared only three days before. It appears that he did not take any interest in the paper, and was occupied in his own business as a photographer and general dealer. But he allowed his name to remain on the record as the printer, and we think he has not made out the *bonâ fides* of his absence from Rangpur. He is, therefore, legally guilty under section 124A, and we confirm the conviction. In consideration, however, of his expressed intention to sever his connection with the paper we reduce his sentence to what he has already suffered. We think the conviction and sentence under section 153A ought to be set aside. This disposes of both the appeals and the prisoner will be released at once.

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CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Sharfuddin.

BRITISH INDIA STEAM NAVIGATION CO.

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Sept. 8.

Land Acquisition—Jurisdiction of High Court to review award of Land Acquisition Collector—Collector acting under s. 11, if a "Court" and subordinate to the High Court—Land Acquisition Judge, powers of—Discovery—Interlocutory orders—High Court's powers to interfere with interlocutory orders—Land Acquisition Act (I of 1894), ss. 9, 10, 11, 18, 20, 21, 50, 53—High Court's Act of 1861, s. 15—Civil Procedure Code (V of 1908), s. 115, o. xi. r. 12.

The High Court has no jurisdiction to review an order made by the Collector under s. 11 of the Land Acquisition Act as the Collector acting under that section is not a Court, but only an agent of the Government.

Durga Das Rukhit v. Queen-Empress (1), *Ezra v. Secretary of State* (2) referred to.

The Administrator-General of Bengal v. The Land Acquisition Collector (3), *Lekhraj Ram v. Debi Pershad* (4), *Abdool Ali v. Verner* (5), *Luchmeswar Singh v. The Chairman of the Darbhanga Municipality* (6) distinguished.

Civil courts are not powerless to afford relief to a person aggrieved by proceedings taken in nominal compliance with statutory provisions.

Rameswar Singh v. Secretary of State for India (7) referred to.

It is, however, doubtful how far and in what precise mode such relief can be claimed by the Secretary of State or a Corporation for whose benefit proceedings have been taken by the Government under the Land Acquisition Act. The expression "any person interested" in s. 18 does not include the Secretary of State.

Attorney-General v. Great Western Railway Company (8) referred to.

The Court of the Land Acquisition Judge is a court of special jurisdiction, the powers and duties of which are defined by statute, and it cannot be legitimately invited to exercise inherent powers and assume jurisdiction over matters not intended by the Legislature to be comprehended within the scope of the enquiry before it.

* Civil Rules, Nos. 3034 and 3035, 3518 and 3519 of 1910, against the orders of A. Goodeve, Land Acquisition Judge of 24-Parganahs, dated June 30, 1910.

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| (1) (1900) I. L. R. 27 Calc. 820. | (5) (1874) 23 W. R. 73. |
| (2) (1902) I. L. R. 30 Calc. 36; | (6) (1890) I. L. R. 18 Calc. 99; |
| (1905) I. L. R. 32 Calc. 605. | L. R. 17 I. A. 90. |
| (3) (1905) 12 C. W. N. 241. | (7) (1907) I. L. R. 34 Calc. 470. |
| (4) (1908) 12 C. W. N. 678. | (8) (1877) 4 Ch. Div. 735. |

Shyam Chunder Mardraj v. Secretary of State for India (1),
Gajendra Sahu v. Secretary of State for India (2) distinguished.

It was never contemplated by the statute to authorise the Land Acquisition Judge to review the award of the Collector, to cancel it or to remit it to him to be recast, modified or reduced.

The Court of the Land Acquisition Judge is restricted to an examination of the question which has been referred by the Collector for decision under s. 18, and the scope of the enquiry cannot be enlarged at the instance of parties who have not obtained or cannot obtain any order of reference.

Promotha Nath Mitra v. Rakhal Das Addy (3) followed.

An order for discovery can be made in a case under the Land Acquisition Act, under o. xi, r. 12, Civil Procedure Code.

Kishan Chand v. Jagannath Prasad (4) referred to.

When, however, the right to discovery in any form depends upon the determination of any issue or question in dispute in a matter, or it is desirable that some issue or question of law or fact or mixed question of law and fact in dispute should be determined first, the question of discovery may be reserved till after the issue or question has been determined.

Whyte v. Ahrens (5) referred to.

The High Court is not powerless to set matters right when an interlocutory order has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants.

Gobind Mohun Doss v. Kunja Behary Doss (6) referred to.

CIVIL RULES.

The special Land Acquisition Collector of 24-Parganahs had acquired certain properties at Garden Reach, belonging to the British India Steam Navigation Company and the Garden Reach Spinning and Manufacturing Company for the Commissioners for the Port of Calcutta. The two aforesaid companies being dissatisfied with the award asked the Land Acquisition Collector to make a reference to the Civil Court on the ground that the award of the Collector was very much less than the proper value. The cases were accordingly referred to the Special Land Acquisition Judge of 24-Parganahs, Mr. Gordon. Before the Special Land Acquisition Judge, two petitions were presented in each of the above cases by the Secretary of State, praying: (i), that the matter be remitted to the Collector with the direction that he do proceed according

(1) (1908) I. L. R. 35 Calc. 525.

(2) (1908) 8 C. L. J. 39.

(3) (1910) 11 C. L. J. 420.

(4) (1902) I. L. R. 25 All. 133.

(5) (1884) 26 Ch. D. 717.

(6) (1909) 10 C. L. J. 407.

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to law in the matter of making an offer or that his proceedings be quashed or that his proceedings be otherwise dealt with according to law, so that the offer made by him as aforesaid be set aside, recast, modified or reduced, and (ii) for full discovery, to answer fairly and to test properly the case of the claimants. The learned Land Acquisition Judge held that he had no power to remit the award to the Collector and that he could not reduce the total amount of the award, but he held that if it was proved by the evidence before him that the Land Acquisition Collector had exceeded the authority given to him under the Act, the Judge had power to set aside that portion of his award which related to such sums on the ground that it was illegal and void. The Judge also granted the prayer for full discovery.

Against the above orders of the Judge, the claimants moved the High Court on the ground that the Judge had erred in holding—(i), that if the Collector had exceeded his authority and paid away sums which he was not competent to award, he (*viz.*, the Judge) had power to set aside that portion of the award; and (ii) that the prayer for discovery ought not to have been granted. Two Rules were issued against the Secretary of State on the above application.

In answer to the two petitions of the two claimant-companies in this Court the Secretary of State filed two petitions stating: (i) that the Judge had erred in holding that he had no power to remit the award to the Collector; and (ii) that the High Court had ample power to remit the same to the Collector for reconsideration, in case it was held that the Judge had no jurisdiction to remit the award to the Collector. Two other Rules were issued against the two claimant companies on the aforesaid petitions.

All the four Rules were heard together.

Mr. Knight (with him *Mr. St. John Stephen*, *Mr. J. G. Bagram*, *Babu Ram Charan Mitra* and *Babu Joy Gopal Ghosh*), for the Secretary of State in Rule Nos. 3518 and 3519 obtained by the Secretary of State. The order for discovery was made as a matter of course and for the ends of justice.

Are we entitled to see the memorandum of association of the B. I. S. N. Co. or not? Have they the power to carry on all the business they are doing? We are not acquainted with the documents produced by the B. I. S. N. Co., as that was not a judicial proceeding. Land Acquisition proceedings may be viewed in the light of a statutory arbitration. The Collector is only an executive person. We have a right to ask for all information. The question of discovery being wholly in the discretion of the Court, an application under s. 115 is futile. It is also for the opposite party to come under s. 15 of the Charter, where there is no appeal.

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This was an interlocutory order: *Harsaran Singh v. Muhammad Raza* (1). The following cases were also cited—*Chattar Singh v. Lekhraj Singh* (2), *Mahabir Prasad v. Basdeo Singh* (3), *In re H. H. the Nizam of Hyderabad* (4), *Motilal Kashibhai v. Nana* (5), *Dhapi v. Ram Pershad* (6), on the point of interlocutory order and High Court's jurisdiction to interfere under s. 115, C. P. C. The Court of the Land Acquisition Collector is not subordinate to the High Court. The Court is a court of special jurisdiction; it is a creature of the statute. The Judge dealing with these cases is appointed by special notification. Under s. 3, sub-section (3) of the Land Acquisition Act, Mr. Goodeve is a special judge. He is not a District Court. For the High Court to have jurisdiction to interfere, the Court of the Land Acquisition Collector must be subordinate to the High Court: see s. 54 of the Land Acquisition Act and s. 105 C. P. C., o. XI, rr. 12, 21, and o. XLIII, r. 1, cl. (f); *Amir Hassan Khan v. Sheo Baksh Singh* (7). The site of the bridge was never acquired in these proceedings. We cannot move a single stone out of it. Has the Secretary of State got no remedy? See *Dhunput Singh v. Indur Chunder Doogur* (8), *Doorga Soonduree Debia v. Kashee Kant Chuckerbutty* (9), *Kureem Shaikh v. Mokhoda Soonduree*

(1) (1881) I. L. R. 4 All. 91.

(5) (1892) I. L. R. 18 Bom. 35.

(2) 1883) I. L. R. 5 All. 293.

(6) (1887) I. L. R. 14 Calc. 768.

(3) (1884) I. L. R. 6 All. 234.

(7) (1884) I. L. R. 11 Calc. 6.

(4) (1886) I. L. R. 9 Mad. 256.

(8) (1870) 13 W. R. 121.

(9) (1870) 14 W. R. 212.

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Dassee (1), on the legality of this Court's interference under section 15 of the Charter.

Even if this Court could interfere, it should not in such cases.

Dr. Rash Behary Ghose (with him *Babu Surendra Nath Ray* and *Babu Satyendra Nath Ray*), shewing cause. It is not on the basis of our earnings in the coal business that we base our claim. See *Bhandi Singh v. Ramadhin Rai* (2), *Roghunath Das v. Collector of Dacca* (3), *Ezra v. Secretary of State* (4), *Ezra v. Secretary of State for India* (5), *In re Merwanji Muncherji Cama* (6), *Abu Bakar v. Peary Mohan Mukerjee* (7), *Gobinda Kumar Roy Chowdhury v. Debendra Kumar Roy Chowdhury* (8), *Mahammad Safi v. Haran Chandra Mukherjee* (9), *Prabal Chandra Mukherjee v. Raja Peary Mohun Mukherjee* (10), *Promotha Nath Mitra v. Rakhal Das Addy* (11), *Synd Abdool Ali v. Verner* (12), *Imdad Ali Khan v. The Collector of Farakabad* (13), *The Crown Brewery, Mussoorie v. The Collector of Dehra Dun* (14), *Babujan v. The Secretary of State for India* (15), *Shyam Chunder Mardraj v. Secretary of State for India* (16), *Gajendra Sahu v. The Secretary of State for India* (17), *The Municipal Corporation of Pabna v. Jogendra Narain Raikut* (18).

Mr. Goodeve had no authority to pass orders for discovery, etc. If that order was without jurisdiction, that is enough to entitle the High Court to interfere.

Mr. Knight, in reply. The cases cited by Dr. Ghose are all distinguishable, as in all those cases the proceedings were regular. The Collector instead of governing himself by the Act has acquired not only the Bracebridge Hall, but a highway, a foreshore and chattels. The properties acquired are

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| (1) (1875) 23 W. R. 268. | (9) (1908) 12 C. W. N. 985. |
| (2) (1905) 2 C. L. J. 359. | (10) (1908) 12 C. W. N. 987. |
| (3) (1910) 11 C. L. J. 612. | (11) (1910) 11 C. L. J. 420. |
| (4) (1902) I. L. R. 30 Calc. 36, 85. | (12) (1874) 23 W. R. 73. |
| (5) (1905) I.L.R. 32 Calc. 605, 628;
L. R. 32 I. A. 93. | (13) (1885) I. L. R. 7 All. 817. |
| (6) (1907) 9 Bom. L. R. 1232,
1238. | (14) (1897) I. L. R. 19 All. 339. |
| (7) (1907) I. L. R. 34 Calc. 451. | (15) (1896) 4 C. L. J. 256. |
| (8) (1907) 12 C. W. N. 98. | (16) (1908) I. L. R. 35 Calc. 525. |
| | (17) (1908) 8 C. L. J. 39. |
| | (18) (1908) 13 C. W. N. 116. |

quite outside the limit of things that can be acquired by him. Crown property is acquired without any notice to the Crown.

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It is a reference outside the Act: *Lekhraj Ram v. Debi Pershad* (1), *Syud Abdool Ali v. Verner* (2), *The Administrator-General of Bengal v. The Land Acquisition Collector* (3). This Court can help us if wrong has been done.

If the Collector has gone outside the Act, the whole award is bad: see section 26, Land Acquisition Act. An Appeal Court can only decide on the points stated by the Collector—1st, as to area; 2nd, as to amount of compensation; and 3rd, as to apportionment. Any Land Acquisition Judge is at liberty to reconsider any of the three items: see sections 12 to 18. The award is always treated as an indivisible whole. Being embarrassed and misled, the Collector has misconceived the value of the land: see section 20. The compensation is always a total sum and can neither be subdivided nor distributed. It must either be acquitted *in toto* or questioned *in toto*.

Upon this case depends the possibility of carrying out large works of improvement. What would be a reasonable compensation? If there had been an ouster and if the companies had filed a suit, they would have got back the land and some damages for use and occupation. The jetty was wholly unauthorised and an unwarrantable trespass from the day it was built. They are mere licensees, and not for value either. The license can therefore be determined at any moment. They said the jetty even was a freehold in perpetuity and you could assess it at thirty years. The Collector has paid for the land and the jetty at an exorbitant rate.

[*Dr. Ghose*. He has only paid at the market value. The Secretary of State threw away several opportunities of controverting the award. My friend cannot go into facts in the nature of a demurer.]

• See *Young & Co. v. The Mayor and Corporation of Royal Leamington Spa* (4), as regards solemnities and formalities

(1) (1908) 12 C. W. N. 678.

(2) (1874) 23 W. R. 73.

(3) (1905) 12 C. W. N. 241.

(4) (1883) 8 App. Cas. 517.

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necessary. The jetty is resting upon piles which is built upon the foreshore of the river. Where, however, is the sanction? The Lieutenant-Governor even cannot grant the same: *John Doe v. E. I. Company* (1), *Walji Karimji v. Jaganath Premji* (2), *Secretary of State for India v. Kadirikutti* (3), *Bagram v. The Collector of Bhullooa* (4), *Sateowri Ghosh Mondal v. Secretary of State* (5).

The Port Commissioners have acquired dynamos and railway lines. How could they? See section 56 of Act III (B.C.) of 1890.

[MOOKERJEE J. What would have been your position if Mr. Duval had awarded only a lump sum of 14 lacs without giving the items?]

He is bound to give the particulars. He was not bound to allocate. He has gone outside the Act. See Cripps on Compensation, 5th Ed. Ch. XIV, p. 322, and *In re Dare Valley Railway Company* (6). See also as to right to sue on new condition of things: *Shama Purshad Roy Chowdery v. Hurro Purshad Roy Chowdery* (7), *Jogesh Chunder Dutt v. Kali Churn Dutt* (8), *Jugdeo Narain Singh v. Raja Singh* (9).

On the question of discovery, see *Morrice v. Swaby* (10), *Murtens v. Haigh* (11), *The Compagnie Financiere et Commerciale du Pacifique v. The Peruvian Guano Company* (12), *Marriott v. Chamberlain* (13).

On the High Court's power to interfere, see *In the matter of the Petition of Rajkissen Singh* (14), *In the matter of the Petition of Gobind Koomar Chowdry* (15).

Dr. Ghose, in reply. Under the Charter Act, this Court cannot go into matters over which it has Appellate Jurisdiction. The case of *the Administrator-General of Bengal v. The*

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| (1) (1856) 6 M. I. A. 267. | (9) (1888) I. L. R. 15 Calc. 656. |
| (2) (1877) I. L. R. 2 Bom. 84, 90. | (10) (1840) 2 Beav. 499; |
| (3) (1890) I. L. R. 13 Mad. 369. | 48 E. R. 1275. |
| (4) (1864) W. R. Gap. No. 243. | (11) (1863) 3 De Gex. & J. 528; |
| (5) (1894) I. L. R. 22 Calc. 252. | 46 E. R. 741. |
| (6) (1868) L. R. 6 Eq. 429, 435. | (12) (1882) 11 Q. B. D. 55. |
| (7) (1865) 10 M. I. A. 203. | (13) (1886) 17 Q. B. D. 154. |
| (8) (1877) I. L. R. 3 Calc. 30, 38. | (14) (1866) B. L. R. F. B. 605. |
| (15) (1867) B. L. R. F. B. 714. | |

Land Acquisition Collector (1), is of a doubtful character. In 1910 no sense is the Collector subject to the Appellate Jurisdiction of the High Court. The award on its face does not show excess of jurisdiction: see *Hudson on Compensation*, Vol. II. p. 1521; section 129 of the old Civil Procedure Code and o. XXXI, r. 12 of the Judicature Act (Annual Practice, 1910, p. 443); see also *Benhow v. Low* (2), *Downing v. Falmouth United Sewerage Board* (3), *Gobinda Mohan Das v. Kunja Behary Dass* (4), *In the matter of Anarendra Nath Chatterjee v. Kally Kissen Tagore* (5), and *Lyell v. Kennedy* (6).

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Even if the award had been from a judiciary, this Court could not have interfered under the Charter. Under the Judicature Act, there is an appeal against an order granting discovery of documents: see Annual Practice, 1910, p. 437. Order XI, C. P. C. does not apply to Land Acquisition proceedings. It was never the practice under the old Acquisition Acts to order discovery. Nor can it be made under the present Act (English cases cited on the practice).

What is referred to the Land Acquisition Judge is the objection of the claimant: *Abu Bakar v. Peary Mohan Mukerjee* (7). The only part to be dealt with by the Judge is the part objected to by the claimant.

Mr. Bagram, in reply, referred to *Ezra v. Secretary of State for India* (8), *Hampden v. Wallis* (9), *The Bombay Tramway Company v. The Municipal Corporation of the City of Bombay* (10).

Mr. Knight, shewing cause in Rules Nos. 3034 and 3035. Whatever the loss may be, the loss is not really of the Companies. For the first time an admission is made here that the Company is willing to give a limited discovery. But they have made no affidavits to show exactly what they are prepared to do: see Annual Practice, 1910, Vol. I., p. 445.

(1) (1905) 12 C. W. N. 241.

(2) (1880) 16 Ch. D. 93.

(3) (1887) 37 Ch. D. 234.

(4) (1909) 14 C. W. N. 147.

(5) (1897) 2 C. W. N. 17.

(6) (1883) 8 App. Cas. 217.

(7) (1907) I. L. R. 34 Calc. 451.

(8) (1905) I. L. R. 32 Calc. 605;

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(9) (1884) 27 Ch. D. 251.

(10) (1904) I. L. R. 28 Bom. 502.

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Dr. Ghose, in reply. The Collector's award is not under the Land Acquisition Act: *Omatul Medhi v. Kulsum* (1).

Cur. adv. vult.

MOOKERJEE AND SHARFUDDIN JJ. These four Rules are directed against two orders of the same description made by the Land Acquisition Judge of the 24-Parganahs in two references made to him under section 18 of the Land Acquisition Act at the instance of two claimants, the British India Steam Navigation Company and the Garden Reach Spinning and Manufacturing Company. The properties in respect of which the references were made have been acquired by the Government for the Commissioners of the Port of Calcutta. The orders of the Land Acquisition Judge have been assailed before us on behalf of both the Secretary of State and the Claimants. To appreciate the true bearing of the questions raised, which are of considerable importance and not wholly free from difficulty, it is essential that we should state in brief outline the circumstances under which the orders in controversy were made by the Court below.

After the references under section 18 had been made by the Collector, two applications in each of the cases were presented on behalf of the Secretary of State to the Land Acquisition Judge on the 22nd and 23rd June, 1910. In the first application, objections were taken to the validity of the award of the Land Acquisition Collector on the ground that under that award various sums had been awarded to the claimants in contravention of the law; it was accordingly prayed that the award might be remitted with directions that the Collector do proceed according to law or that the award be set aside, recast, modified or reduced. In the second application, it was prayed that under order XI, rule 13 of the Civil Procedure Code of 1908, an order might be made upon the claimants to make discovery on oath of all documents in their possession relating to the matters in controversy. In respect of the first

of these applications the learned Judge in the Court below has held,—first, that he had no power to remit the award to the Land Acquisition Collector for reconsideration, and, secondly, that he could not reduce the total amount which may have been properly awarded by the Collector; but the learned Judge has also expressed the opinion that he had power to review the items which made up the total award, so as to reduce any item by an amount equal to that by which another item might have to be increased; in other words, that if the Judge was satisfied that the Collector had exceeded his statutory authority and paid away sums which he was not competent to award under the provisions of the Act, the Judge had authority to review that portion of the award of the Collector and set it aside on the ground that it was illegal and void. In respect of the second application, the learned Judge has expressed the opinion that before an order for discovery was made, it would be to the interest of the litigants to have the questions in controversy between them definitely ascertained, but he has nevertheless directed the claimants to make a full and sufficient affidavit of all documents in their possession or power relating to the matters in question, and also to produce for the inspection of the legal advisers of the Secretary of State all documents mentioned in such affidavit except such as they are legally entitled to refuse to produce. In the Rules obtained by the claimants, the order of the learned Judge has been assailed substantially, on two grounds, namely, *first*, that the order for discovery ought not to have been made, and *secondly*, that he had no jurisdiction to review the award of the Collector at the instance of the Secretary of State, to set aside any portion of it as illegal and void, and generally, to readjust the various items some of which are not impeached by the claimants. In the Rules obtained by the Secretary of State, the order of the learned Judge has been assailed on the ground that he has for erroneous reasons held that he had no jurisdiction to remit the award to the Collector and that upon the facts alleged by the Secretary of State and not controverted by the claimants, though ample opportunity was repeatedly offered to them to do so, he ought

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to have exercised such jurisdiction. It has been further argued in the alternative in these Rules, that if the learned Judge had no jurisdiction to remit the award to the Collector, this Court possesses such jurisdiction, and that we should, in the exercise of such jurisdiction, remit the award to the Collector for reconsideration, as otherwise grave and irreparable injury would be done to the Commissioners of the Port of Calcutta for whose benefit the properties have been acquired by the Government. The principal questions, therefore, which emerge for consideration from the arguments which have been addressed to us on both sides may be formulated as follows: *first*, has this Court jurisdiction to review the award of the Collector or cancel or modify it, or to remit the proceedings to him for reconsideration; *secondly*, has the Land Acquisition Judge jurisdiction to take action of the same description; *thirdly*, has the Land Acquisition Judge jurisdiction to review, at the instance of the Secretary of State, the award of the Collector in so far as it is not challenged by the claimants, to re-examine items not controverted by them, and to set aside the award partially on the ground that it is illegal and void; and *fourthly*, has the Land Acquisition Judge jurisdiction to make an order for discovery; if so, whether that jurisdiction has been appropriately exercised in these cases? These questions have been argued with great earnestness and elaboration, justified not merely by the value of the claim, but also by the novelty of some of the questions in controversy. Since the close of the hearing of these Rules, we have minutely scrutinised all the materials which have been placed before us and have anxiously considered every argument addressed to us on both sides. We now proceed to state the conclusions at which we have arrived.

In so far as the first of the four questions which arise for consideration is concerned, it has been argued on behalf of the Secretary of State that it is competent to this Court to review an order made by the Collector under section 11 of the Land Acquisition Act, either under section 115 of the Civil Procedure Code of 1908 or under section 15 of the High Courts

Act, 1861, and in support of this proposition reliance has been placed upon the case of the *Administrator General of Bengal v. The Land Acquisition Collector* (1). In our opinion this contention is entirely unsustainable, because the Collector when he holds an enquiry and makes an award under section 11 of Act I of 1894, is not a Court, and is undoubtedly not a Court subject to the Appellate Jurisdiction of the High Court. In support of this proposition, reference may be made to the observations of this Court in *Durga Das Rukhit v. Queen Empress* (2), *Ezra v. Secretary of State* (3), and of their Lordships of the Judicial Committee in *Ezra v. Secretary of State for India* (4). In *Ezra v. Secretary of State* (5), this Court observed that throughout the proceedings, the Collector acts as the agent of the Government for the purpose of the acquisition, clothed with certain powers to require the attendance of persons to make statements relevant to the matter which he has to investigate; but he is in no sense of the term a judicial officer, nor is the proceeding before him a judicial proceeding. Again in *Ezra v. Secretary of State* (4), their Lordships of the Judicial Committee observed that when the sections relating to the Collector's award are read together, it is found that the proceedings resulting in an award are administrative and not judicial; that the award in which the enquiry results is merely a decision binding upon the Collector as to what sum shall be tendered to the owner of the lands; and that if a judicial ascertainment of the value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court. On this principle, it was ruled that, in the absence of fraud or corruption, the fact that the Collector obtained information without the knowledge of the claimants and did not disclose it on the enquiry could not vitiate his proceedings. It is, in our opinion, reasonably clear from an examination of the provisions relating to the enquiry and award by the Collector, that he is not a Court

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(1) (1905) 12 C. W. N. 241.

(4) (1905) I. L. R. 32 Calc. 605;

(2) (1900) I. L. R. 27 Calc. 820.

L. R. 32 I. A. 93.

(3) (1902) I. L. R. 30 Calc. 36.

(5) (1902) I. L. R. 30 Calc. 36, 85.

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within the meaning of section 115 of the Code of 1908, much less is he a Court subject to the Appellate Jurisdiction of the High Court within the meaning of section 15 of the High Courts Act of 1861. The case of *The Administrator General of Bengal v. The Land Acquisition Collector* (1) is obviously distinguishable. The learned Judges merely held that when a Collector refuses to make a reference to the Civil Court upon an application made under section 18, he acts judicially and his order is subject to revision by the High Court. Whether this view is or is not well-founded, it is needless to examine for our present purposes, because the learned Judges in that very case conceded that up to and including the time of making his award, the Collector is in no sense a judicial officer, that the proceedings before him are not judicial proceedings, and however irregular his proceedings may be, the High Court cannot interfere with his award made under section 11 of the Act. It has been suggested, however, on behalf of the Secretary of State, upon the authority of the decision of this Court in *Lekhraj Ram v. Debi Pershad* (2) that there is no form of judicial injustice which the High Court, if need be, cannot reach under the Charter Act. With reference to this decision it must be observed that the injustice which was there sought to be rectified was due to the action of a Court subject to the Appellate Jurisdiction of the High Court, namely, the Court of the Chief Presidency Magistrate at Calcutta, and we are entirely in accord with the view indicated in this decision that the exercise of the powers of superintendence of this Court cannot be fettered by any artificial rules or crystallised into inelastic formulas. To attract the operation, however, of section 15 of the High Courts Act, 1861, it must be established in the first place that the order assailed has been made by a Court subject to the Appellate Jurisdiction of the High Court. The section does not entitle the High Court to rectify what may be called executive or administrative injustice in contradistinction to judicial injustice, nor can forms of procedure be legitimately ignored altogether to bring a case within

(1) (1905) 12 C. W. N. 241.

(2) (1908) 12 C. W. N. 678.

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section 15 of the High Courts Act; for instance, it would be idle to contend that if a litigant has his remedy by a regular suit, he may nevertheless claim as a matter of right the interference of this Court under the Charter Act. Reference has also been made to the cases of *Syud Abdul Ali v. Verner* (1), and *Maharaja Luchmeswar Singh v. The Chairman of the Darbhanga Municipality* (2) to show that this Court has authority to review an award by a Collector. These cases, however, are of no real assistance and do not support the contention put forward on behalf of the Secretary of State. In the first case, the decision which was assailed was an award by the Judge. In the second case, the question of the legality of the award of the Collector, was raised in a regular suit. Indeed the cases of *Maharaja Luchmeswar Singh v. The Chairman of the Darbhanga Municipality* (2), *Saunby v. Water Commissioners* (3) and *The Gaekwar Sarkar of Baroda v. Gandhi Kachrabhai Kasturchand* (4), reviewed by this Court in *Rameswar Singh v. Secretary of State for India* (5), indicate that the Civil Courts are not powerless to afford relief to a person aggrieved by proceedings taken in nominal compliance with statutory provisions, though there is apparently room for serious controversy how far, if at all, and in what precise mode, such relief can be claimed by the Secretary of State or the Corporation for whose benefit proceedings have been taken: *In re Merwanji Muncherji Cama* (6), *Darjadinomal v. Secretary of State* (7), where reference is made to *Attorney-General v. Great Western Railway Company* (8). It is sufficient for us to hold that the Secretary of State cannot invite this Court to review the award of the Collector in the exercise of our revisional jurisdiction or of the powers of superintendence vested in us under the Charter Act. The first question must consequently be answered against the Secretary of State.

(1) (1874) 23 W. R. 73.

(5) (1907) I. L. R. 34 Calc. 470.

(2) (1890) I. L. R. 18 Calc. 99;

(6) (1907) 9 Bom. L. R. 1232;

L. R. 17 I. A. 90.

1238.

(3) [1906] A. C. 110.

(7) (1908) 2 Sind L. R. 68.

(4) (1903) I. L. R. 27 Bom. 344;

(8) (1877) 4 Ch. D. 735.

L. R. 30 I. A. 60.

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In so far as the second question is concerned, we have been invited by the learned Counsel for the Secretary of State to hold that the Land Acquisition Judge had jurisdiction to review the award of the Collector, to set it aside as illegal and made in contravention of the provisions of the law, and to direct him to recast, modify and reduce it. In support of this proposition, reliance has been placed upon the cases of *Shyam Chunder Mardraj v. Secretary of State for India* (1) and *Gajendra Sahu v. Secretary of State for India* (2). This proposition has been strenuously controverted by the claimants. It has been argued on their behalf that the Court of the Land Acquisition Judge is a Court of strictly limited jurisdiction and that the scope of the enquiry before it is accurately defined by the statutory provisions on the subject and cannot possibly be enlarged so as to embrace an enquiry into the legality of the proceedings before the Collector antecedent to his award. In support of this position, reliance has been placed upon the cases of *Imdad Ali Khan v. Collector of Farakhabad* (3), *The Crown Brewery, Mussoorie v. The Collector of Dehra Dun* (4), *Babujan v. Secretary of State* (5), *Bhandi Singh v. Ramadhin Rai* (6), *Roghunath Dass v. Collector of Dacca* (7), *Raja Nilmoni Singh Deo v. Rambandhu Rai* (8), and reference has been made to the observations of Lord Truro in *The London and North Western Railway Company v. Bradley* (9), which, it is said, are not affected by the decision of the House of Lords in *The Directors of the Hammersmith and City Railway Company v. Brand* (10). In our opinion, there is no room for controversy that the Court of the Land Acquisition Judge is a Court of Special Jurisdiction, the powers and duties of which are defined by the statute, and that there is no foundation for the contention put forward on behalf of the Secretary of State that a Court of this description can be legitimately invited to

(1) (1908) I. L. R. 35 Cal. 525.

(2) (1908) 8 C. L. J. 39.

(3) (1885) I. L. R. 7 All. 817.

(4) (1897) I. L. R. 19 All. 339.

(5) (1906) 4 C. L. J. 256.

(6) (1905) 2 C. L. J. 359.

(7) (1910) 11 C. L. J. 612.

(8) (1881) I. L. R. 7 Cal. 388.

(9) (1851) 3 Mac. & Gor. 336, 340.

(10) (1869) 4 H. L. 171; 197.

exercise inherent powers so as to assume jurisdiction over matters not intended by the legislature to be comprehended within the scope of the enquiry before it. The cases of *Shyam Chunder Madraj v. Secretary of State for India* (1), and *Gajendra Sahu v. Secretary of State for India* (2), are clearly distinguishable. In the first of these cases the property acquired, namely, fishery rights, was not 'land' within the meaning of the Act, and could not by any possibility form the subject matter of statutory acquisition. In the second case, the property actually acquired was different from that mentioned in the declaration. Under such circumstances, it was ruled by this Court that the Land Acquisition Judge might refuse to take cognisance of a reference made by the Collector under section 18 of the Land Acquisition Act. It must further be observed that in these two cases, it was the claimant who ultimately took up the position that the reference was without jurisdiction, and it was at his instance that the objection was allowed to prevail. The substance of the matter, therefore, was that the claimant, although he had obtained a reference under section 18, subsequently resiled from that position, and invited an order for what really amounted to a discharge of the reference. This position is perfectly intelligible, because such a course would still leave it open to the claimant to sue the Secretary of State for damages, for unauthorised interference with his property in merely nominal compliance with the provisions of the statute. *Saunby v. Water Commissioners* (3), *The Gaekwar Sarkar of Baroda v. Gandhi* (4), *Rameswar Singh v. Secretary of State for India* (5). The position, however, which we are here invited to affirm is of an entirely different description. The claimant has here obtained a reference under section 18 of the Land Acquisition Act, because he is dissatisfied with the award. It is the Secretary of State who has challenged the reference. The contention on his behalf in substance has been that, not only has the claimant no grievance, but that he has been awarded large sums of money by the Collector in a wholly

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(3) [1906] A. C. 110.

(5) (1907) I. L. R. 34 Calc. 470.

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unauthorised manner on account of a jetty, an overbridge, an electric plant, stone ballast, a way bridge and loss of time due to possible removal of business to other premises, for all of which the claimant, it is suggested, has not the remotest vestige of a legal claim. It has further been urged that the statutory allowance on these items has been improperly awarded in contravention of the plain provisions of the statute, and further that the sums awarded for land, houses and trees have been largely in excess of their market value. It was upon these allegations and others of a like character, that the Counsel for the Secretary of State invited the learned Judge in the Court below to review the award of the Collector, to cancel it, and to remit it to him to be recast, modified or reduced. In our opinion, the course which the learned Judge was invited to pursue was never contemplated by the framers of the statute, and is not authorised by any provision thereof. It is not necessary for us to review minutely the provisions of the Act which were recently examined by this Court in detail in the case of *Roghunath Dass v. The Collector of Dacca* (1). The scope of the reference made at the instance of a claimant under section 18 of the Land Acquisition Act is manifestly of a strictly limited character. If the contention of the learned Counsel for the Secretary of State were well-founded, we would have to hold in substance that a reference under section 18 may be made at the instance not merely of the claimant but also of the Secretary of State. It follows indisputably, however, from an examination of the earlier sections of the Land Acquisition Act and especially of sections 9, 10 and 11 that the expression "any person interested" in section 18 does not include the Secretary of State. Section 50, on the other hand, makes it clear beyond the possibility of any dispute that a Local Authority or Company for whose benefit land may be acquired by the Government is not entitled to demand a reference under section 18: *The Municipal Corporation of Pabna v. Jogendra Narain Raikut* (2). If, therefore, the Secretary of State is not entitled to claim a reference under section 18 of

(1) (1910) 11 C. L. J. 612.

(2) (1908) 13 C. W. N. 116.

the Land Acquisition Act, as we hold he is not, we find it difficult to appreciate how at his instance the Land Acquisition Judge can be invited to review the award of the Collector, to cancel or to remit it for modification or reduction. Obviously, the Secretary of State cannot be permitted to achieve by the suggested indirect method what, it is indisputable, he cannot obtain directly. Section 18 and other sections which follow it make it reasonably plain that the question of the legality of the acquisition or the impropriety of the award of the Collector were not intended by the Legislature to form the subject of enquiry by the Land Acquisition Judge at the instance of the Secretary of State. The reference is obtained by the claimant, the objections he can urge against the award of the Collector are specified in sub-section (1) of section 18. Under section 20, the Court has to determine the objection, and under section 21 the scope of the enquiry is restricted to a consideration of the interests of the persons affected by the objection. The questions, therefore, which were sought to be raised before the learned Judge in the Court below at the instance of the Secretary of State were manifestly questions which as a Court of Special Jurisdiction he was not competent to try, and we feel no doubt that he acted properly when he refused to remit the award to the Collector for reconsideration, modification, or reduction. The second question must consequently be answered against the Secretary of State.

In so far as the third question which arises for consideration is concerned, the learned Judge in the Court below has held that although he has no jurisdiction to reduce the total sum awarded by the Collector, he is entitled upon a reference under section 18 made at the instance of the claimant, to consider items not disputed by the claimant, with a view to reduce them by an amount which the claimant may prove ought to be added to other items. In support of this position, the learned Judge has placed reliance upon the case of *Hooghly Mills Company v. Secretary of State* (1). An examination of

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(1) (1903) 12 C. L. J. 489.

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the judgment, however, taken along with the points in controversy in that case, makes it clear that the question now raised did not raise for consideration at all, and the isolated passage upon which reliance is placed cannot be deemed to embody a judicial determination of this point. The answer to the question raised, therefore, must depend upon the provisions of the Land Acquisition Act to which reference has already been made in the course of our examination of the second question. Section 18 contemplates a reference at the instance of the claimant, and indicates the objections that may be taken by him to the award; he is also required to state the grounds upon which such objection is taken. Under section 20, the Court proceeds to determine the objection, that is, the objection taken by the claimant under section 18. Section 20 does not contemplate that any cross objection, if such an expression is permissible in this connection, may be taken by the Secretary of State. To take a concrete illustration, suppose the property acquired is land and a building thereon. The Collector in his award values the land at Rs. 500 a cottah and allows Rs. 1,000 for the house. The claimant obtains a reference on the ground that the land has been undervalued; is it open to the Secretary of State, who cannot obtain a reference under section 18, to urge that the building has been over-valued, to such an extent that the objection of the claimant as to the undervaluation of the land, however well-founded it may be, must fail. We are not prepared to hold that such a procedure was contemplated by the Legislature. We are not unmindful that section 18 when it specifies the four heads under which objection may be taken by the claimant, speaks of the amount of compensation. This expression by itself may be comprehensive enough to afford some basis for an argument that the whole question of the amount of compensation is referred. But this view, we think, is sufficiently negatived by section 20 which directs the Court to determine the objection, that is, the objection of the claimant. Because the claimant objects to a particular item and obtains a reference, the Court cannot review another, a totally distinct and

unconnected item. The view we take is to some extent supported by the principle which underlies the decisions of this Court in *Abu Bakar v. Peary Mohun Mukerjee* (1), *Gobinda Kumar Roy v. Debendra Kumar Roy* (2), *Mahammad Saif v. Haran Chandra Mukerjee* (3) and *Prabal Chundra Mukerjee v. Peary Mohun Mukherjee* (4). That principle is, as it is put in the case of *Promotha Nath Mitra v. Rakhal Das Addy* (5), that the Court of the Land Acquisition Judge is restricted to an examination of the question which has been referred by the Collector for decision under section 18 and the scope of the enquiry cannot be enlarged at the instance of parties who have not obtained, or who, as in the case before us, cannot obtain any order of reference. In our opinion, the learned Judge was in error when he held that he had authority to review the award of the Collector in regard to the matters not challenged by the claimant and to set it aside on the ground of illegality. The matter of which the learned Judge was properly seized was the objection of the claimant and he should now proceed to determine its validity. The third question must consequently be answered against the Secretary of State.

In so far as the fourth question raised before us is concerned, it is really comprised in a very narrow compass. As we have already stated, an application was made in the Court below on behalf of the Secretary of State for discovery under order 11, Rule 12 of the Code of 1908. The learned Judge was inclined to the opinion that the questions in controversy should be specified before the order for discovery was made. Yet he ultimately directed the claimants to make an affidavit of documents and to produce them in Court for inspection within a specified period. In this Court, it has been argued on behalf of the claimants that an order for discovery cannot be made in a case under the Land Acquisition Act and that, in any event, an order ought not to be made at the present

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(1) (1907) I. L. R. 34 Cal. 451. (3) (1908) 12 C. W. N. 985.

(2) (1907) 12 C. W. N. 38. (4) (1908) 12 C. W. N. 987.

(5) (1910) 11 C. L. J. 420, 423.

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stage of the proceedings. This position has been controverted on behalf of the Secretary of State, and it has been urged that an order for discovery can be claimed almost as a matter of right. We think there is no substance in the contention of the claimants that an order for discovery cannot be made in a case under the Land Acquisition Act. Section 53 makes the provisions of the Civil Procedure Code, save in so far as they may be inconsistent with anything contained in the Act, applicable to all proceedings before the Court of the Land Acquisition Judge. As the learned Judges of the Allahabad High Court observed in the case of *Kishan Chand v. Jagannath Prasad* (1), the comprehensive language of this section, is not to be restrained, and a similar view has been indicated in *Bhandi Singh v. Ramadhin Rai* (2), and *Zemindars of Dhar v. Runa* (3). In our opinion, there is no intelligible reason why the operation of rule 12 of order XI of the Code of 1908 should be excluded from cases under the Land Acquisition Act. The mere circumstance that an order of this description cannot be shown to have been made or found necessary in any previous case, is by no means conclusive. On the other hand, as is well illustrated by the case of *Lyell v. Kennedy* (4), it may not be always safe to affirm that an order of this description has been never made before. The order of the Court below is, however, open to objection on the ground that it is premature and is of the vaguest description. The points in controversy between the parties have not yet been specified and the learned counsel for the Secretary of State has plainly stated that in his view some of the objections taken by the claimant to the award of the Collector are on the face of them absolutely unsustainable in law. Manifestly if there are any objections which must fail on the ground that they cannot be entertained at all upon any conceivable principle of law, no discovery need be directed as regards them. It is well settled that in cases where the right to discovery in any form depends upon the determination of any

(1) (1902) I. L. R. 25 All. 133. (3) (1906) Punj. Rec. 53;

(2) (1905) 2 C. L. J. 359.

(1906) P. L. R. 103.

(4) (1883) 8 App. Cas. 217.

issue or question in dispute in the cause or matter, or it is desirable that some issue or question of law or fact or mixed question of law and fact in dispute should be determined first, the question of discovery may be reserved till after the issue or question has been determined. To take an illustration, if a mortgagor wishes to redeem an estate and it is denied that he has the right to redeem at all, discovery relating to questions of account will be postponed till it is known whether there is such a right or not; so also in an action by a principal against an agent when agency is denied; *Whyte v. Ahrens* (1), *Benno v. Richardson* (2), *Tasmanian Main Line Railway Company v. Clark* (3), *Great Western Colliery Company v. Tucker* (4). In the case before us, the proper course to follow is to have the matter in controversy between the claimants and the Secretary of State specified and to have a determination upon the preliminary question, which, if any, of these objections are manifestly not maintainable in law. After this has been decided and the learned Judge has got before him the questions to be investigated, he will deal with the application of the Secretary of State for discovery, and pass such orders thereon, as he may deem essential in the interests of justice, for determination of matters relevant to the points in controversy: *Downing v. Falmouth United Sewerage Board* (5), *In re Wills' Trade Marks* (6), *White & Co. v. Credit Reform Association and Credit India* (7), *South African Republic v. La Campagnie Franco-Belge* (8), *Marriot v. Chamberlain* (9), *Kent Coal Concession, Ltd., v. Duguid* (10). If discovery is needed to enable the Secretary of State to test the legality of any of the objections of the claimant, the order may also be made for that purpose. The fourth question raised before us must consequently be answered partially against the Secretary of State.

At one stage of the argument the contention was put forward that it was not competent to this Court to consider the

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| (1) (1884) 26 Ch. D. 717. | (6) [1892] 3 Ch. 207. |
| (2) (1893) 62 L. J. Ch. 710. | (7) [1905] 1 K. B. 653. |
| (3) (1879) 27 W. R. (Eng.) 677. | (8) (1898) 14 T. L. R. 403. |
| (4) (1874) 9 Ch. App. 376. | (9) (1886) 17 Q. B. D. 154. |
| (5) (1887) 37 Ch. D. 234, 242 | (10) [1910] 1 K. B. 904. |

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legality of the order of the Court below; this objection, however, lost all force when both parties found it essential in their own respective interests, to assail the order. We may add, however, that this Court is not powerless to set matters right when an interlocutory order has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants: *Gobind Mohun Doss v. Kunja Behary Doss* (1), *Amjad Ali v. Ali Hossain Johar* (2).

The result, therefore, is that the Rules obtained by the Secretary of State must be discharged with costs. The Rules obtained by the claimants will be made absolute and the order of the learned Judge made on the 30th June 1910, discharged. The costs in these Rules will be costs in the proceedings in the Court below. The matter will be remitted to the learned Judge so that he may take up the objections of the claimants and first determine which of them are sustainable in law. He will then make an order for discovery and give specific directions in that behalf as may be found necessary.

Orders discharged

S. M.

(1) (1909) 10 C. L. J. 407.

(2) (1910) 12 C. L. J. 519;
 15 C. W. N. 353.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Fletcher.

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Nov. 7.

Sedition—Attack on rival political party but not on Government established by law in British India—Limits of legitimate criticism of acts and measures of Government—Construction of letter or article in a newspaper—Admissibility of articles in other issues not forming the subject of the charge when the identity of the writer is not proved—Penal Code (Act XLV of 1860) s. 124A—Evidence Act (I of 1872) s. 15—Liability of registered printer and publisher—Printing Presses and Newspapers Act (XXV of 1867) s. 7.

A letter or an article in a newspaper containing an attack on a rival political organization and not on the Government established by law in British India, is not seditious within the meaning of s. 124A of the Penal Code.

A man may criticise or comment on any act or measure of the Government, legislative or executive, and freely express his opinion on it. He may express the strongest condemnation of such measures, and he may do so severely and even unreasonably, perversely or unfairly provided he does not, whether in his comments on measures or not, hold up the Government itself to hatred and contempt.

Queen-Empress v. Bal Gangadhar Tilak (1) approved of.

It is not sedition for a writer to describe the Reform scheme as being monstrous and misbegotten, because it is not founded on democratic principles and not a genuine reform or a genuine initiation of constitutional progress, or to assert that some of the police officials and the judiciary are corrupt, unscrupulous and partial, or to state that if an organisation which he believes to be lawful is suppressed by proclamation it is arbitrary, and that in such case the responsibility will not rest on him for the madness which crushes down open and legal political activity in order to give a desperate and sullen nation into the hands of fiercely enthusiastic and unscrupulous forces, or to inculcate the doctrine of passive resistance or refusal of co-operation with the Government within legal limits, or to describe the British Courts in India as ruinously expensive.

In construing a newspaper article its meaning must be taken from the article as a whole and not from isolated passages. Words and expressions such as *arbitrary executive* must not be looked at as if the writer was a constitutional lawyer instead of a journalist.

* Criminal Revision, No. 744 of 1910, against the order of D. Swinhoe, Offg. Chief Presidency Magistrate of Calcutta, dated June 18, 1910.

(1) (1897) I. L. R. 22 Bom. 112.

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Queen-Empress v. Bal Gangadhar Tilak (1) approved of.

Articles not forming the subject of the charge and appearing in other issues of the same paper, are not admissible to show the intention of the writer in the article complained of in the absence of proof of his identity. The declared printer and publisher of a letter or article in a newspaper is amenable to the law merely on proof that it is calculated to excite feelings of disaffection, hatred or contempt against the Government, but the prosecution must prove either that the writer does in fact excite such feelings or that his intention was to do so.

The writer of an article may be guilty of sedition no matter how guardedly he attempts to conceal his real object, but the registered printer and publisher cannot be punished if the concealed object is not established by the evidence on the record.

Queen-Empress v. Amba Prasad (2) referred to.

THE petitioner was the registered printer and publisher of the *Karmayogin*, a weekly newspaper printed at, and issued from, the Sewnarain Press at 4, Shamapuker Lane, having last made a declaration under s. 5 of the Printing Presses and Newspapers Act (XXV of 1867) on the 19th June, 1910. He was charged under s. 124A of the Penal Code in respect of an open letter entitled "To my countrymen" which appeared over the name of "Arabinda Ghose" in the issue of the paper of the 25th December, 1909. During the trial before the Chief Presidency Magistrate three other copies of the same paper, dated the 24th and 31st July and 2nd October, 1909, containing three articles called respectively "The doctrine of sacrifice" [Ex. 18/1], "An open letter to my countrymen" [Ex. 16/1], and "Nationalist organization" [Ex. 17/1] were filed by the counsel for the prosecution. The article of the 31st July purported to be signed by "Arabinda Ghose" but not the others. No evidence was given by the prosecution as to who the writer of these articles was nor whether they were written by the same person.

The article which formed the subject of the charge was as follows:—

[*Karmayogin*, dated the 26th December, 1909.]

"To my Countrymen."

"Two decisive incidents have happened which make it compulsory on the nationalist party to abandon their attitude of reserve and expectancy

and once more assume their legitimate place in the struggle for Indian liberties. The reforms, so long trumpeted as the beginning of a new era of constitutional progress of India, have been thoroughly revealed to the public intelligence by the publication of the Council's Regulations and the results of the elections showing the inevitable nature and composition of the new Councils. The negotiations for the union of moderates and Nationalists in an United Congress have failed owing to the insistence of the former on the Nationalists subscribing to a Moderate profession on their faith.

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The survival of Moderate policy in India depended on two factors, the genuineness and success of the promised Reforms, and the use made by the Conventionists of the opportunity given them by the practical suppression of Nationalist public activity. The field was clear for them to establish the effectiveness of the Moderate policy and the living force of the Moderate Party. Had the reforms been a genuine initiation of constitutional progress, the Moderate tactics might have received some justification from events. Or had the Moderates given proof of the power of carrying on a robust and vigorous agitation for popular rights, their strength and vitality as a political force might have been established, even if their effectiveness had been disproved. The Reforms have shown that nothing can be expected from persistence in moderate politics except retrogression, disappointment and humiliation. The experience of the last year has shown that without the Nationalists at their back, the Moderates are impotent for opposition and robust agitation. The political life of India in their hands has languished and fallen silent.

By the controvertible logic of events, it has appeared that the success and vigour of the great movement inaugurated in 1905 was due to the union of Moderates and Nationalists on the platform of self-help and passive resistance. It was in order to provide an opportunity for the re-establishment of this union, broken at Surat, that the Nationalists gathered in force at Hooghly in order to secure some basis and means of negotiation which might lead to united effort. The hand which we held out has been rejected. The policy of Lord Morley has been to rally the Moderates and coerce the Nationalists; the policy of the Moderate Party led by Mr. Gokhale and Sir Pherozesha Mehta, has been to play into the hands of that policy and give it free course and a chance of success. This alliance has failed of its object; the beggarly reward the Moderates have received has been confined to the smallest and least popular elements in their party. But the rejection of the alliance with their own countrymen by the insistence on creed and constitution shows that the Moderates mean to persist in their course even when all motive and political justification for it have disappeared. Discomfited and humiliated by the Government, they can still find no way to retrieve their position nor any clear and rational course to suggest to the Indian people whom they misled into a misunderstanding of the very limited promises held out by Lord Morley.

Separated from the great volume of Nationalist feeling in the country, wilfully shutting its doors to popularity and strength by the

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formation of electorates as close and limited as those of the Reformed Councils, self doomed to persistence in a policy which has led to signal diasaster the convention is destined to perish of inanition and popular indifference, dislike and opposition. If the Nationalists stand back any longer either the national movement will disappear or the void created will be filled by a sinister and violent activity. Neither result can be tolerated by men desirous of their country's development and freedom.

The period of waiting is over. We have two things made clear to us : *first*, that the future of the nation is in our hands, and, *secondly*, that from the Moderate Party, we can expect no cordial co-operation in building it. Whatever we do, we must do ourselves, in our own strength and courage. Let us then take up the work God has given us, like courageous, steadfast and patriotic men willing to sacrifice greatly and venture greatly because the mission also is great. If there are any unnerved by the fear of repression, let them stand aside. If there are any who think that by flattering Anglo-India or coquetting with English Liberalism they can dispense with the need of effort and the inevitability of peril. Let them stand aside. If there are any who are ready to be satisfied with mean gains of unsubstantial concessions, let them stand aside. But all who deserve the name of nationalists must now come forward and take up their burden.

The fear of the law is for those who break the law. Our aims are great and honourable, free from stain or reproach, our methods are peaceful, though resolute and strenuous. We shall not break the law and therefore we need not fear the law. But if a corrupt police unscrupulous officials, or a partial judiciary make use of our honourable publicity of our political methods to harass the men who stand in front by illegal ukases, suborned and perjured evidence or unjust decisions, shall we shrink from the toll that we have to pay on our march to freedom? Shall we cower behind a petty secrecy or a dishonourable inactivity? We must have our associations, organisations, our means of propaganda, and if, these are suppressed, by arbitrary proclamations, we shall have done our duty by our motherland and not on us will rest any responsibility for the madness which crushes down open and lawful political activity in order to give a desperate and sullen nation into the hands of those fiercely enthusiastic and unscrupulous forces that have arisen among us inside and outside India so long as any loophole is left for peaceful effort, we will not renounce the struggle. If the conditions are made difficult and almost impossible, can they be worse than those our countrymen have to contend against in the Transvaal? or shall we, the flower of Indian culture and education, show less capacity, and self-devotion than the coolies and shopkeepers who are there rejoicing to suffer for the honour of their nation and the welfare of their community?

What is it for which we strive? The perfect self-fulfilment of India and the independence which is the condition of self-fulfilment are our ultimate goal. In the meanwhile such imperfect self-development and such incomplete self-government as are possible in less favourable circumstances, must be obtained as a preliminary to the more distant realiza-

tion. What we seek is to evolve self-government either through our own institutions or through those provided for us by the law of the land. No such evolution is possible by the latter means without some measure of administrative control. We demand therefore not the monstrous and misbegotten scheme which has just been brought into being, but a measure of reform based upon those democratic principles which are ignored in Lord Morley's reforms—a literate electorate without distinction of creed, nationality or caste, freedom of election unhampered by exclusory clauses, an effective voice in legislation and finance and some check upon an arbitrary Executive. We demand also the gradual devolution of executive government out of the hands of the bureaucracy into those of the people. Until these demands are granted, we shall use the pressure of that refusal of co-operation which is termed passive resistance. We shall exercise that pressure within the limits allowed us by the law, but apart from that limitation the extent to which we shall use it depends on expediency and the amount of resistance we have to overcome.

On our own side we have great and pressing problems to solve. National education languishes for want of moral stimulus, financial support and emancipated brains keen and bold enough to grapple with the difficulties that hamper its organisation and progress. The movement of arbitration successful in its inception has been dropped as a result of repression. The swadeshi boycott movement still moves by its own impetus, but its forward march has no longer the rapidity and organised irresistibility of forceful purpose which once swept it forward, social problems are pressing upon us which we can no longer ignore. We must take up the organisation of knowledge in our country, neglected throughout the last century. We must free our social and economic developments from the incubus of the litigious resort to the ruinously expensive British Courts. We must once more seek to push forward the movement toward economic self sufficiency, industrial independence.

These are the objects for which we have to organise the natural strength of India. On us falls the burden. In us alone there is the moral ardour, faith and readiness for sacrifice which can attempt and go far to accomplish the task. But the first requisite is the organisation of the National Party. I invite that party in all the great centres of the country to take up the work and assist the leaders who will shortly meet to consider steps for the initiation of nationalist activity. It is desirable to establish a National Council and hold a meeting of the body in March or April of the next year. It is necessary also to establish nationalist associations throughout the country. When we have done this, we shall be able to formulate our programme and assume our proper place in the political life of India."

(Sd.) Arabinda Ghose.

The petitioner was convicted by the Magistrate, on the 18th June, 1910, under s. 124A of the Penal Code and sen-

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tenced to six months' rigorous imprisonment. He then moved the High Court and obtained a Rule on the 18th August.

Mr. B. C. Chatterjee and Babu Manmatha Nath Mookerjee,
 for the petitioner.

*The Advocate-General (Mr. Kenrick, K.C.) and The Deputy
 Legal Remembrance (Mr. Orr),* for the Crown.

Cur. adv. vult.

HOLMWOOD J. I have had the advantage of reading the judgment which my learned brother is about to deliver, and I find myself in agreement with him that the present appellant, the printer and publisher of the *Karmayogin*, cannot be convicted under section 124A of the Indian Penal Code on the article which we have before us in this case.

It is unfortunate that of a series of articles alleged to have been written by one and the same hand the prosecution should have selected the one which on the face of it appears the least amenable to a charge of sedition, and it is doubly unfortunate that the case should have been so inadequately tried in the Lower Court. It is true that under the law, the printer and publisher of a seditious article can be punished merely on proof that the article is calculated to excite feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, but that renders it all the more incumbent on the prosecution to show either that the article does as a fact bring the Government into hatred or contempt, or that the intention of the writer was to excite disaffection. EDGE C.J. in delivering the judgment of the Full Bench in *Queen-Empress v. Amba Prasad* (1), points out that the writer may be guilty of exciting or attempting to excite feelings of "disaffection," as that term is used in 124A, no matter how guardedly he may attempt to conceal his real object, but it is idle to contend that the printer and publisher can be punished if the concealed object is not established by evidence on the record. Now, in this case, although

the prosecution alleged that a series of articles had been written by one individual and had those articles produced by a Police Officer who said that it was his duty to read them and if objectionable to forward them to his superiors, no evidence was offered who that individual was nor whether all the articles were by the same author.

It was urged by the learned Advocate-General that these articles were admissible under section 15 of the Evidence Act for the purpose of showing that the publication of the article before us in this case was not accidental, but that has obviously nothing to do with their admissibility for the purpose of showing the intention of the writer. In order to use them for this purpose it was necessary to show who the writer was and that all the articles produced were by the same hand. This not having been done we are compelled to take the article before us as it stands without any of the informing commentaries which were sought to be drawn from one previous article in particular by the learned Advocate-General.

The author of the present article may be a very ingenious and subtle master of language: there are indications throughout the article, that he is. Several of his conditional hypotheses if they were interpreted with the double meaning that is sought to be read into them from other sources, on the footing that the aims of the Nationalist party are really different from what they purport to be in this article, might bear a very sinister interpretation indeed; but as the possible author of this and the other articles is not before us and there is nothing to show that they are the work of one and the same hand, it would be extremely unfair to the appellant to judge him by any standard other than that of what the article before us really purports to contain.

The learned Presidency Magistrate in the Court below has not dealt with the purport of the article as a whole. He has selected isolated passages and in my opinion given them an interpretation that they will not bear and in some cases appended a quite inaccurate account of what they purport to convey. For instance the article does not attack the Govern-

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ment when it is criticising the alleged inadequacy of the Reform Scheme. It attacks the Moderate Party who have been assumed to have expressed their concurrence with the scheme. Again the writer nowhere suggests that without recourse being had to violence, advancement is impossible, as the learned Magistrate finds he does, and so on in other passages of the judgment.

Having regard to the very inadequate way in which the case was dealt with in the Lower Court I have had to seriously consider whether it would not be our duty to direct a retrial, but having regard to the fact that the appellant had already served more than half his sentence before he was admitted to bail, and to the fact that the prosecution must be presumed to have abstained from proving the identity and intentions of the writer upon grounds which to them seemed good and sufficient, I do not think any good purpose would be served by carrying the case against the present appellant any further. I, therefore, concur with my learned brother that the appeal must be allowed, the conviction and sentence set aside and the appellant acquitted and released from bail.

FLETCHER J. The appellant in this case has been convicted by the learned Officiating Chief Presidency Magistrate of an offence punishable under section 124A of the Indian Penal Code as being the printer and publisher of an article entitled "To my countrymen" which appeared in the issue of the *Karmayogin* newspaper, on the 25th December, 1909, and has been sentenced to undergo six months' rigorous imprisonment. The appellant has preferred an appeal to this Court against the conviction and sentence passed upon him. The article forming the subject of the charge purports to be an open letter addressed by one Arabindo Ghose to his countrymen. The principles applicable to cases of this nature are not open to doubt and all that we have to do is to apply those principles to the case now before us.

Section 124A of the Indian Penal Code coupled with the three explanations thereto contains in clear and concise lan-

guage the law in this country relating to sedition which is practically identical with the law in England. It may, however, be useful in passing to quote one judicial utterance as to the limits permitted by the law to writers commenting on the action of the Government. In charging the Jury in *Queen-Empress v. Bal Gangadhar Tilak* (1), Strachey J. made the following remarks: "It (*i.e.*, the section) shows clearly what a public speaker or writer may do, and what he may not do. A man may criticise or comment upon any measure or act of Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any Military Expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people,—then he is guilty under the section, and the explanation will not save him." Now, in this case the general theme of the writer of the article is a severe criticism on the policy of what is called the moderate party and a call to his countrymen to "come forward and take up their burden." The learned Advocate-General in the course of his argument has taken us through the whole of the article line by line and pointed out the parts which in his view are open to complaint. The learned Advocate has, moreover, relied upon two other articles, exhibits 16/1 and 18/1, which he states were written by the same writer and appeared in the issues of the *Karmayogin* on the 24th and 31st July, 1909. These two articles he claimed to use for the purpose of showing the meaning of

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(1) (1897) I. L. R. 22 Bom. 112, 137.

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certain expressions used in the article complained of and also to show the intention of the writer.

But, as we pointed out during the argument, apart from all other questions, these articles were not proved in such a manner as to entitle us to take them into consideration. We must, therefore, deal with the article complained of as it stands.

Now the first words that the learned Advocate-General has laid stress upon is the call to the Nationalist party to once more assume their legitimate place in the "struggle for Indian liberties." This, it is said, is a clear invitation by the writer to his countrymen to join in a movement having for its attainment the liberation of India from foreign rule. But in my opinion the words standing alone are capable of a much more innocent meaning. The use of the word "liberties" in the plural would not *primâ facie* point to liberation of the country from foreign rule, but to certain specific liberties and this view appears to be supported by the subsequent portion of the article when the writer sets out what the demand of the Nationalist Party must be, *viz.*, an effective voice in legislation and finance and some control over the Executive.

The next portion of the article on which the learned Advocate-General laid stress is the portion "The survival of moderate politics in India depended on two factors, the genuineness of the promised reforms and the use made of them by the Conventionists of the opportunity given them by the practical suppression of Nationalist public activity Had the reforms been a genuine initiation of constitutional progress the moderate tactics might have received some justification from events The reforms have shown that nothing can be expected from persistence in moderate politics except retrogression, disappointment and humiliation." The argument put forward on this part of the articles is that the statement that the reforms are not "genuine" or a "genuine initiation of constitutional progress," holds the Government up to hatred and contempt as implying that they have given the people something that is not "genuine." To my mind this is a very far-fetched argument. The writer was obviously

entitled to express his opinion on the reform scheme and the mere fact that he states that the scheme is not a genuine reform or not a genuine measure of constitutional progress cannot be seditious. But then it is said that the statement that "nothing can be expected from persistence in moderate politics except retrogression, disappointment and humiliation," followed subsequently by the words "discomfited and humiliated by the Government" are obviously seditious as the words mean that the Government has humiliated a large portion of the people, *viz.*, the moderate party, and, therefore, the statement brings the Government into hatred or contempt. It is obvious that this is not the natural or ordinary meaning of the words. The natural meaning is that the moderate party has been humiliated by accepting the Reform Scheme which is not a measure of "constitutional progress." Then a portion of the article was relied upon as showing that the writer was advocating that violent methods should be used if necessary. The words are "If the Nationalists stand back any longer, either the national movement will disappear or the void created will be filled by a sinister and violent activity."

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But that the intention is not such is shown by the sentence that immediately follows "Neither result can be tolerated by men desirous of their country's development and freedom."

The learned Advocate-General next referred us to the following part of the article. "The fear of the law is for those who break the law. Our aims are great and honourable, free from stain or reproach. Our methods are peaceful though resolute and strenuous. We shall not break the law and, therefore, we need not fear the law. But if a corrupt police, unscrupulous officials or a partial judiciary make use of the honourable publicity of our political methods to harass the men who stand in front by illegal ukases suborned and perjured evidence or unjust decision, shall we shrink from the toll that we have to pay on our march to freedom

We must have our associations, our organisations, our means of propaganda, and if they are suppressed by arbitrary proclamations, we shall have done our duty by our motherland

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and not on us will rest any responsibility for the madness which crushes down open and lawful political activity in order to give a desperate and sullen nation into the hands of those fiercely enthusiastic and unscrupulous forces that have arisen among us inside and outside India."

The argument on the first part of this paragraph is that as the Government appoint the police officials and judiciary, to describe them as corrupt, unscrupulous and partial reflects upon the Government and brings it into hatred and contempt. But, though the words used are such that one may strongly disapprove of, I am unable to see that the words taken in their context necessarily bear this meaning. The first portion of the paragraph states that the movement is to be a movement within the law and then follows the sentence commencing "But if" which words clearly govern the sentence which follows: It seems to me reasonably clear that the writer does not intend to designate all the police officials and judiciary as corrupt, unscrupulous and partial. It is also to be remembered that the article is not one written on the police, officials or judiciary. Although one may regret the use of such words, I cannot bring myself to believe that the use of these words in the context in which they are used falls within section 124A of the Indian Penal Code.

The other three expressions in the paragraph which have been dealt within are the expressions "arbitrary proclamation" "madness" and "a desperate and sullen nation."

It is very obvious that the expression "arbitrary proclamation" coupled with the word "associations" points to proclamations under the Criminal Law Amendment Act suppressing associations. I take it, however, that there is no particular harm in a writer stating that if his association, which he believes to be a lawful one, is suppressed the proclamation will be arbitrary. It is difficult to deal seriously with the other two expressions "madness" and "a desperate and sullen nation."

That the first of these two expressions charges the Government with insanity cannot be argued. It is said, however,

that the meaning of the word as used is that of recklessness and, therefore, falls within section 124A. The word, however, is clearly used to indicate an act of folly which in the context is clearly innocuous. Similarly with regard to the expression "a desperate and sullen nation!" The learned Advocate argued that these words were seditious as implying that the Government had made the nation desperate and sullen and, therefore, brought the Government into hatred and contempt. But if arguments of this nature were assented to, the right of comment on the action of the Government given by law would be wholly taken away.

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Then we come to what the writer states is to be the demand of the nationalist party. "We demand, therefore, not the monstrous and misbegotten scheme which has just been brought into being but a measure of reform based upon democratic principles . . . an effective voice in legislation and finance, and some check upon an arbitrary executive. We demand also the gradual devolution of executive Government out of the hands of the bureaucracy into those of the people. Until these demands are granted we shall use the pressure of that refusal of co-operation which is termed passive resistance. We shall exercise that pressure within the limits allowed us by the law, but, apart from that limitation, the extent to which we shall use it depends on expediency and the amount of resistance we have to overcome."

The argument for the Crown is that the use of the words "monstrous and misbegotten scheme," as applied to the Reform Scheme hold the Government up to "ridicule and vituperation." But that does not appear to me to be the natural consequence of these words. Doubtless the words are a strong condemnation of the Reform Scheme framed by the Government. The law, however, permits comments on actions of the Government provided they do not bring the Government into hatred or contempt or promote disloyalty. A statement that the Reform Scheme is monstrous and misbegotten, because it is not founded upon democratic principles, is not by itself one that exceeds fair and reasonable comment.

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The next words that the learned Advocate-General much relied on were the words "arbitrary executive" which he stated were "sufficient of themselves to contravene the law." He argued that any constitutional lawyer would know that the Executive Government in India was not an arbitrary executive, as no person is liable to be deprived of his liberty or to have his property forfeited without recourse to the Courts of law. In the first place, however, it is to be noticed that we must look at the words used by the writer not as if he were a constitutional lawyer but as a writer in a journal.

I quote from the very pertinent remarks made by Strachey J. in charging the Jury in *Queen-Empress v. Bal Gangadhar Tilak* (1). "A journalist is not expected to write with the accuracy and precision of a lawyer or a man of science; he may do himself injustice by hasty expressions out of keeping with the general character and tendency of the articles." Moreover, there is a more general and popular meaning to the words "arbitrary executive" than that given by the learned Advocate-General. Further, if the definition given by the learned Advocate-General is correct, it may be a matter of opinion how far the Government does or does not fall within that definition. The next expression to which exception was taken was "passive resistance." The writer has, however, defined it himself as being a refusal of co-operation within the limits allowed by the law. It seems difficult to deduce a seditious meaning from this phrase. But then it is said that although the writer states that the pressure is to be used within the limits allowed by the law, yet there is a covert threat to use pressure outside those limits if necessary.

All I can say on this argument is that I have not been able to discover this covert threat from the words used. The next and last part of the article, which the learned Advocate-General has called our attention to is: "The movement of arbitration successful in its inception has been dropped as a result of repression. The swadeshi boycott movement still moves by its own impetus. We must free our social

and economic development from the incubus of the litigious resort to the ruinously expensive British Courts."

The learned Advocate-General stated that the expression "swadeshi boycott" referred to a boycott of the Government. But it is a matter of public knowledge that it refers to a boycott of foreign goods; and again he laid stress upon the expression "British Courts." The question as to the expense involved in litigation before the Courts is surely a matter on which a writer is entitled to comment.

This is not the first time, nor will it I imagine be the last, when the Courts will be described as ruinously expensive, and I cannot see how such a statement can come within section 124A.

I have now dealt with the arguments that have been made before us in detail on the article, and I have given the best consideration I can on the article as a whole and I have come to the conclusion that it does not appear from the article that it is such as is likely to cause disaffection or produce hatred or contempt of the Government, nor can I find from the article that such was the intention of the writer.

Doubtless to many if not to most people the writer's view on the great Reform Scheme would appear to be unreasonable and one that does not recognise the great advance that has been made.

But with that we are not concerned. All that we have to decide is whether the law, as it is, has or has not been broken by the appellant by the publication of this article, and I have come to the conclusion that it has not.

The learned Advocate-General has pressed upon us strongly to take into consideration the state of the country at the time this article was published. The authorities show that that is a matter to be taken into consideration, but that obviously does not entitle the Court to convert an article not falling within the mischief aimed at by section 124A into one that does.

In my opinion the appeal ought to be allowed and the conviction and sentence set aside.

E. H. M.

Accused acquitted.

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CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Fletcher.

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GOBINDA CHANDRA ADDY

v.

CORPORATION OF CALCUTTA.*

Drainage—Calcutta Municipal Act (Bengal III of 1899) ss. 299 and 574—Place lawfully set apart for the discharge of drainage—Private common drain belonging to the landlord not subject to right of user as public drain by the Corporation—Liability of tenant.

A place lawfully set apart for the discharge of drainage, by the Corporation within the meaning of s. 299 of the Calcutta Municipal Act, must be a place over which the Corporation have acquired by some procedure under the Act, a right to make use of private property as a public drain.

A tenant of premises is not bound, under s. 299, to convey the drainage therefrom into a drain belonging to his landlord over which the Corporation have no such right.

THE petitioner was a tenant of premises No. 53, Nimoo Gossain's Lane, in the town of Calcutta, and was living in his own hut. The owner of the premises Nos. 53 to 55/1, a bustee, constructed a pipe drain, called the common house-drain, in 1906 or 1907, about 500 feet long, on the north of this block of huts, connected with the Municipal drain in the lane situated about 350 feet from the premises No. 53. There were two-yard gulleys made to receive the drainage from these premises and a surface drain leading from them to the gulleys. A notice was issued under s. 299 of the Municipal Act, with the approval of the General Committee, and served on the petitioner requiring him to connect the surface drain with the landlord's drain on the north. It appeared that the Corporation had no right to use the latter as a Municipal drain. The petitioner, having failed to comply with the notice, was prosecuted by the Corporation and convicted by the Municipal Magistrate, on the 25th July, 1910,

* Criminal Revision, No. 1246 of 1910, against the order of Amrita Lal Mookerjee, Municipal Magistrate of Calcutta, dated July 25, 1910.

under ss. 299 and 574 of the Act, and sentenced to a fine of Rs. 10. He thereupon moved the High Court and obtained the present Rule in terms set forth in the judgment below.

Babu Jnanendra Nath Sarkar, for the petitioner.

Babu Atulga Charan Bose, for the Corporation.

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HOLMWOOD AND FLETCHER JJ. This was a Rule calling upon the Municipal Magistrate to show cause why the fine on the petitioner should not be set aside on the ground that the drain called the common house-drain belongs to the landlord of the bustee and is not a place lawfully set apart for the discharge of drainage from the premises of the petitioner, and that the landlord is the person against whom proceedings should be taken in respect of the drainage of the petitioner's house.

We have heard the learned vakil in support of the Rule and the learned vakil who shows cause for the Corporation in reply, and we are clearly of opinion that section 299 does not operate against the petitioner in the present case. We are referred to section 298, but that has merely a historical interest, for it is only alleged that it is under that section that this common bustee drainage was originally effected. That arrangement appears to have been that every hut in the bustee which had a surface drain connected with the private common drain of the landlord and that private common drain of the landlord discharged into the Municipal sewer at a distance outside the statutory limits. The learned Municipal Magistrate finds that this private common drain of the landlord must presumably be a place lawfully set apart for the discharge of drainage. In a case like this there should be no presumption as to the statutory powers of the Corporation. A place lawfully set apart for the use of the public by the Corporation must be a place over which the Corporation have acquired by some procedure under the statute a right to make use of private property as a public drain, and there is nothing to show in this case, and it is not even alleged, that the Cor-

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poration have obtained any powers to set apart this place for the discharge of drainage. We, therefore, think that it is still private property of the zemindar, and that the petitioner who is merely a tenant cannot be called upon to alter his connecting drain to suit the convenience of the Corporation. He certainly cannot be fined for neglecting to do so.

The Rule is made absolute and the order of the Municipal Magistrate discharged. The fine, if paid, must be refunded.

E. H. M.

Rule absolute.

PRIVY COUNCIL.

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P.C.*
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(AND FOUR OTHER APPEALS CONSOLIDATED.)

[On appeal from the High Court at Fort William in Bengal.]

Bengal Tenancy Act (VIII of 1885) s. 188—Suit for enhancement of rent—Suit by one co-sharer making defendants other co-sharers who refused to join as plaintiffs—Meaning of “act together”—Suit for arrears of rent—Suits expressly authorised by Bengal Tenancy Act—Suits not requiring authority of Act—Bengal Tenancy Act, ss. 7 and 30.

The institution of a suit for enhancement of rent, being a suit authorised by the Bengal Tenancy Act (VIII of 1885), is something which “a landlord is required or authorised to do” under the Act within the meaning of section 188, and consequently a thing in which all the “joint landlords” must “act together,” that is, take common action. Such a suit, therefore, is only properly framed when all the joint landlords are made plaintiffs. It is not sufficient for one or some of the joint landlords to sue as plaintiff or plaintiffs and make those who refuse to join with him or them defendants in the suit.

Pramada Nath Roy v. Ramani Kanta Roy (1) distinguished.

It is otherwise with a suit for arrears of rent, the bringing of which is not a thing which the landlord is, under the Bengal Tenancy Act, either required or authorised to do. Rent in arrear is a debt the right to recover which arises under the general law, and does not require the authority of the Bengal Tenancy Act; and that Act does not authorise

* *Present:* LORD MACNAGHTEN, LORD MERSEY, LORD ROBSON, SIR ARTHUR WILSON and MR. AMEER ALI.

(1) (1907) I. L. R. 35 Calc. 331; L. R. 35 I. A. 73.

such a suit, though, on a decree being obtained, consequences may follow which result from the provisions of the Act, and from those provisions alone.

FIVE consolidated appeals from decrees (18th July, 1st August, and 18th August, 1904), of the High Court at Calcutta, which dismissed appeals from judgments and decrees (8th February, 1904), of the District Judge of Alipur, affirming decrees (28th June, 1899), of the Munsif of Alipur.

The plaintiffs were the appellants to His Majesty in Council.

The five appeals arose out of five different suits instituted in the Munsif's Court, of which four were for recovery of arrears of rent and for enhancement of rent, and one for enhancement of rent only. So far as the claims for arrears of rent were concerned, the plaintiffs obtained decrees; and the only question arising in these consolidated appeals, was as to their right to obtain decrees for enhancement in the suits as framed.

The plaintiffs claimed to be the sole proprietors of a zemindari estate separately assessed to Government revenue, and consisting of two mahals numbered 166 and 166/1 in the Collectorate register. The original defendants in the suits were tenants of lands forming a part of the plaintiffs' zemindari and the plaintiffs alleged that they were, as such, liable to pay a fixed and definite sum as rent to the plaintiffs alone; that they (the plaintiffs) had received for a considerable time past, and still continued to receive such fixed and definite sum; and that the rents were below the proper rate and were liable to enhancement.

The only defence now material was that the plaintiffs were not the sole proprietors of the estate, and that their co-sharers not having been made parties the suits were not maintainable; and when the suits first came on for hearing, on 15th May, 1897, the Munsif, holding that though the rent had been paid separately, the lands were undivided, dismissed the suits on the above ground.

On appeal to the Subordinate Judge of the 24-Parganas the suits were, as regards the question of enhancement, remanded for trial of the issue whether the plaintiffs were, or

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were not, co-parceners with others, and it was, on 21st December, 1908, found by the Munsif that they were; and their co-sharers (who were the owners of four other zemindari estates separately assessed to Government revenue, and numbered as mahals 136, 163, 168 and 222 in the Collectorate register) were added as *pro formâ* defendants to the suits, the order to that effect being affirmed by the District Judge of the 24-Parganas on appeal on 18th February, 1899.

On 28th June, 1899, when the hearing of the suits (as so amended) was continued by the Munsif, he held that the plaintiffs as "fractional landlords," could not maintain the suits for enhancement of rent as the co-sharers being defendants did not join with the plaintiffs in their claim, but in fact contested it, and therefore, so far as the right to enhance the rent was concerned, he dismissed the suits.

The plaintiffs appealed from that decision, and the appeals came before another District Judge of the 24-Parganas who, on 12th May, 1900, after referring to the estates (mahals 166 and 166/1) of which the plaintiffs claimed to be proprietors, said:—

"These two estates and four other estates hold a large quantity of land in common; there has been no partition of such land by metes and bounds; nor has there been any proportionate division of the rents of such land according to any definite shares; but the tenants of such lands pay their rent in certain fixed sums to the proprietors of the several estates. It has been found and it is no longer open to dispute that such is the mutual position of the proprietors, (the plaintiffs) and the tenure-holders (the defendants) in this suit (whatever the origin of it may have been) for the defendants tenure is composed of such common land."

He was of opinion that by the judgment of 18th February 1899, the then District Judge had decided that the co-sharer landlords must be added as parties plaintiffs in order to make a suit for enhancement of rent maintainable; that having only been joined as defendants the judgment was not compied with; that the said judgment constituted a *res judicata* upon the whole question; and that to decree the appeals would be to overrule that judgment which he had no power to do: and on these grounds he dismissed the appeals.

The appeals then came before a Divisional Bench of the High Court (Sir F. W. Maclean C.J. and Geidt J.) who on 25th August, 1903, at the instance of the plaintiffs, remanded the cases to ascertain whether there had been any partition, not by metes and bounds, but of one estate into six separate estates with a proportionate allotment of rents to such separate estates.

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The appeals came on remand before another District Judge, and he, on 8th February, 1904, decided that there had been no partition, and dismissed them with costs.

The plaintiffs again filed appeals from these decrees which the High Court (Rampini and Saroda Charan Mitter JJ.) dismissed summarily under section 551, read with section 587 of the Code of Civil Procedure (Act XIV of 1882).

An application for leave to appeal to His Majesty in Council having been rejected by the High Court, the plaintiffs applied for, and on 16th February obtained, special leave to appeal against the decrees of the High Court as above stated, and also against the order of remand of 25th August, 1903.

On these appeals,

DeGruyther, K.C., and *A. M. Dunne*, for the appellants, contended that they were entitled to maintain the suits. The mahals of which they were proprietors formed separate estates; they were separately entered in the Collectorate register; bore separate tauji numbers; had a separate assessment for the Government revenue payable in respect of them, and a separate rental payable by the tenants thereof. These facts raised, it was submitted, a presumption of law that the appellants were separate and divided owners of their mahals, and being entitled to collect their rents separately were also entitled to enhance them when necessary. Reference was made to *Hem Chandra Chowdhry v. Kali Prasanna Bhaduri* (1). The appellants were not joint landlords. But even assuming they were, the addition of their co-sharers by the Court as defendants en-

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titled them to maintain the suits as well for enhancement as for arrears of rent. The claims for arrears of rent had been decreed the rent being due to them separately, and it followed in law that they were entitled to enhance those rents separately, and to maintain a suit for that purpose. It had been held that one of several co-sharers could maintain a suit for arrears of rent making the other co-sharers parties defendants, if they refused to join as plaintiffs: see *Pramada Nath Roy v. Ramani Kanta Roy* (1), and a suit for enhancement, it was submitted, could also be maintained framed in the same way. On the principle laid down in that case section 188 of the Bengal Tenancy Act (VIII of 1885) did not make it necessary for the co-sharers to be added as plaintiffs, the bringing of a suit not being a thing which joint landlords were "required or authorised to do" under that Act. The right to bring a suit existed outside the Act. The construction of section 188 was not intended to alter the relation of landlord and tenant as it previously existed under the former Rent Acts (X of 1859 and Bengal Act VIII of 1869). Reference was made to section 187 of the Bengal Tenancy Act. [LORD MACNAGHTEN referred to the case of *Bank of England v. Vagliano* (2), per Lord Herschell as to the proper course in constructing a statute] Bengal Tenancy Act, sections 7, 30, clauses (a) and (b), 65, 66 and 68 were cited. The provisions as to the other co-sharers being parties to the suit were intended to bring all parties interested before the Court, and should not be construed that they were all to be made plaintiffs, a construction which would often defeat the right of one co-sharer, who could not compel the others to be plaintiffs in case they refused to join him as plaintiffs. If they refused he could, it was submitted, make them defendants; see *Pyari Mohan Bose v. Kedarnath Roy* (3). Bengal Tenancy Act, section 54, sub-section (3), sections 143, 159, 162, and (as to limitation) section 184 and schedule III were also referred to.

(1) (1907) I. L. R. 35 Calc. 331,
 344, 345;
 L. R. 35 I. A. 73, 77, 78.

(2) [1891] A. C. 107, 144, 145.
 (3) (1899) I. L. R. 26 Calc. 409.

As to partition it was to be effected by apportioning the rent to be paid by the various tenants, and not, as a rule, by splitting up the lands: Bengal Estates Partition Act (Bengal Act V of 1897) section 3, sub-section (5), and sections 4 and 81, and Bengal Tenancy Act Amendment Act (Bengal Act I of 1907) section 58 (amending section 188 by the addition of a section 188 A) were cited. The suits were remanded by the High Court (unnecessarily as the appellants contended) for further evidence as to whether there had been partition or not, but the appellants had been refused an extension of time they asked for to obtain it.

Ross, for the respondent Prasanna Kumar Banerji (who was concerned only with the suits for enhancement of rent), contended that the institution of such a suit, was, on its true construction, included in section 188 of the Bengal Tenancy Act as being something in which "joint landlords were required and authorised" by the Act to join. That construction of the section was confirmed by the following authorities: *Baidya Nath De Sarkar v. Uim* (1), *Guni Mahomed v. Moran* (2), *Beni Madhub Roy v. Jaod Ali Sircar* (3), *Gopal Chunder Das v. Umesh Narain Chowdhry* (4), *Moheeb Ali v. Ameer Rai* (5), and *Haladhar Saha v. Rhidoy Sundri* (6). The case of *Pramada Nath Roy v. Ramani Kanta Roy* (7), was distinguishable on the ground that a suit for arrears of rent could be brought under the general law, irrespective of the Bengal Tenancy Act; but a suit for enhancement of rent, was specially provided for by that Act (see sections 7 and 30) and could only be brought under its provisions. Section 86 of the Act was also cited. The case of *Hem Chandra Chowdhry v. Kali Prasanna Bhaduri* (8), was not applicable, as in the present case there had been no partition, a fact which had been found against the appellants. The suits had been rightly dismissed

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(1) (1897) I. L. R. 25 Calc. 917.

(2) (1878) I. L. 4 Calc. 96.

(3) (1890) I. L. R. 17 Calc. 390,
392.

(4) (1890) I. L. R. 17 Calc. 695.

(5) (1890) I. L. R. 17 Calc. 538.

(6) (1892) I. L. R. 19 Calc. 593.

(7) (1907) I. L. R. 35 Calc. 331;
I. R. 35 I. A. 73.

(8) (1899) I. L. R. 26 Calc. 832.

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by the High Court under sections 551 and 587 of the Civil Procedure Code of 1882.

DeGruyther, K.C., replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This litigation, which is the out- Nov. 15.
come of five different suits, has lasted for the period of fifteen years. It is not necessary to explain its origin or to trace its course which has certainly been leisurely and somewhat devious. Nothing now remains to be determined but a question of general importance:—

Does the Bengal Tenancy Act, 1885, prohibit one or some of two or more joint landlords from suing to enhance the rent unless both or all of the “fractional landlords” as they are sometimes called, join in the suit as co-plaintiffs?

Section 188 declares that “where two or more persons are joint landlords, anything which the landlord is under this Act required or authorised to do must be done by both or all those persons acting together”

The question therefore divides itself into two branches: (i) Is the institution of a suit to enhance rent, a thing which the landlord is under the Act authorised to do? And (ii) What is the meaning of the words “acting together”?

To take that expression first, it seems to their Lordships that it means just what it says. In order to comply with the Act the persons referred to must take common action. It was argued that it is enough if one of the joint landlords sues as plaintiff and makes those who do not concur with him defendants. In plain words the proposition is that if a person is made a defendant because he is unwilling to act together with the plaintiff he is to be deemed to be acting together with the plaintiff when once he is placed on the record as defendant. It is enough to state the proposition to dispose of it.

Then comes the question, is a suit to enhance rent a thing authorised under the Act? It is so plainly in the case of an occupancy raiyat. The authority is given expressly in section 30. It is so also in the case of tenure holders though the

language is not so explicit. Section 7 (1) provides that in the cases where the rent of the tenure holder is liable to be enhanced it may (subject to any contract between the parties) be enhanced up to a certain specified limit. Now rent can only be enhanced by instituting a suit for that purpose; and therefore it seems tolerably clear that the institution of a suit for enhancement of rent is a thing authorised by the Act in the case of tenure holders as well as in the case of occupancy raiyats.

It was argued that a suit to enhance rent stands on the same footing as a suit for arrears of rent, and that inasmuch as a suit for arrears of rent may be brought by one joint landlord making the other joint landlords defendants [as was decided in the case of *Pramada Nath Roy v. Ramini Kanta Roy* (1)], a similar course may be adopted in a suit to enhance rent. But the answer is that the bringing of a suit for arrears of rent is not a thing which the landlord is under the Act either required or authorised to do. Rent in arrear is a debt. The right to recover a debt arises under the general law. A suit for recovery of rent does not require the authority of the Bengal Tenancy Act, nor does the Act purport to authorise such a suit, though on a decree being obtained consequences may follow which result from the provisions of the Act and from those provisions alone.

Their Lordships therefore think that the judgment of the High Court dismissing these suits was quite right, and they will humbly advise His Majesty accordingly.

The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitor for the respondent, Prosanna Kumar Banerji:
Douglas Grant.

J. V. W.

(1) (1907) 1. L. R. 35 Cal. 331; 1. R. 35 I. A. 73.

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APPELLATE CIVIL.

Before Mr. Justice Carnduff and Mr. Justice Richardson.

DWARKA NATH BIDYADHAR

v.

DAMBARUDHAR MAHAPATRA.*

1910

July 28.

Rent—Maintenance Grant—Baradaran Jagir, Orissa—Landlord and Tenant—Grantor and Grantee—Killajat estates in Orissa—"Light tribute" as rent—Assessment of rent by Settlement Officer—Finality of decision—Bengal Tenancy Act (VIII of 1885) ss. 3 (5), 104, 107—Bengal Tenancy Amendment Act (Ben. III of 1893) s. 9—Second Appeal—Findings of Fact—Inference of Law.

In Orissa, a proprietor of an estate governed by the law of primogeniture made a grant of certain villages as *baradaran jagir*, *khorposak niskar*, etc., for the support of the younger brothers and other nearer relatives of the family; it was not transferable, but was subject to resumption on failure of direct heirs, and the grantee had to pay to the grantor a proportionate share of the Government revenue:—

Held, that the amount payable by the grantee to the grantor under such conditions constituted rent within the meaning of s. 3 (5) of the Bengal Tenancy Act, 1885, and the grantees were tenants and not co-proprietors.

Chunder Kant Chuckerbutty v. Mahomed Hossein (1) referred to.

Where a Settlement Officer made an assessment of rent under s. 104 of the Bengal Tenancy Act (VIII of 1885), which was not appealed against under s. 108 of the Act:—

Held, that the decision of the Settlement Officer was, in view of s. 107 of the Bengal Tenancy Act, 1885, read with s. 9 of Bengal Tenancy Amendment Act, 1898, final.

Though the High Court, in second appeal, cannot interfere with finding of fact, it can interfere with an inference of law drawn from the facts found.

SECOND APPEAL by the defendant, Dwarka Nath Bidyadhar Mangaraj Mahapatra.

*Appeals from Appellate Decrees, Nos. 1068, 1181 and 1182 of 1907, against the decrees of J. J. Platel, District Judge of Cuttack, dated April 2, 1907, affirming the decrees of Moti Lal Singh, Subordinate Judge of that district, dated Sept. 12, 1906.

(1) (1866) 6 W. R. Act X, 1.

Bhagban Chhotrai Mahapatra, Brahmananda Mahapatra and Dambarudhar Mahapatra brought three separate suits against the defendant Dwarka Nath Bidyadhar, which were by consent of parties heard together and disposed of by one judgment in the Subordinate Judge's Court as well as in the District Judge's Court.

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The plaintiffs and the defendant belonged to the same family.

The plaintiffs brought this suit for a declaration that they had an ancestral right to maintenance and held the lands in suit in lieu thereof, for a further declaration that the defendant was not entitled to realise anything over and above the originally fixed "light tribute," with enhancement in proportion to the amount of enhanced revenue assessed at the last settlement, and for an injunction restraining the defendant, who had obtained a rent decree, from executing the same as being a fraudulent decree. The plaintiffs, Bhagaban Chhotrai Mahapatra and Brahmanada Mahapatra, based their title on two ancient Sanads of 1812, while the plaintiff Dambarudhar Mahapatra based his title on a *rafanama* filed in a civil appeal in 1886 between his father and the defendant's grandfather.

The defendant-appellant, the proprietor of Killah Ambo, claimed rent at the rate at which the Settlement Officer had assessed the lands under section 104 of the Bengal Tenancy Act, 1885, and pleaded that, the plaintiffs not having preferred any appeal against the assessment of the Settlement Officer, the order of that officer had become final.

The Subordinate Judge found that the "light tribute" payable by the plaintiffs was not rent and the relationship of landlord and tenant had never existed between the plaintiffs and the defendant, and that the Settlement Officer was incompetent to assess any rent on the land in the suit; and he passed a decree declaring that the plaintiffs were entitled to hold the lands granted to their ancestors by the former proprietor of Killah Ambo in lieu of maintenance on payment to the defendant of only a proportionate share of the Government revenue

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which the defendant had to deposit in the Collectorate. The District Judge affirmed the decree of the Subordinate Judge.

The defendant thereupon preferred this appeal to the High Court.

Babu Pravas Chunder Mitter and *Babu Sushilmadhab Mallick*, for the appellant.

Babu Ramchandra Mazumdar, for the respondent.

CARNDUFF AND RICHARDSON JJ. These three appeals arise out of three suits which were, by consent of parties, heard together and disposed of by the same judgment. The undisputed facts may be thus shortly stated:

The appellant is the proprietor of Killah Ambo in the district of Balasore in Orissa. In this killah the right of primogeniture prevails, the estate being impartible and descending on the death of the proprietor to his nearest male heir. The respondents are the agnates of the proprietor, who is the appellant before us, and whose ancestors assigned the lands in suit, subject to a "light tribute" equivalent to the Government revenue, to the ancestors of the respondents in lieu of maintenance. The respondents in S. A. Nos. 1181 and 1182 base their title on two ancient sanads of the year 1812, while the respondent in the remaining appeal bases his title on a *rafanama* filed in 1886 in a Civil Appeal between his father and the present appellant's grandfather.

Orissa, it is well known, has not been permanently settled. At the last settlement in 1897 the Settlement Officer treated the "light tribute" as rent, and increased it considerably. Thereafter the appellant sued the respondents for arrears of rent as tenants on the basis of the new settlement, and he obtained *ex parte* decrees against them in the years 1903 and 1904. The respondents then instituted these suits in the Court of the Subordinate Judge for declarations that the rent decrees had been fraudulently obtained and ought to be set aside, and that they were liable to pay, presumably as proprietors, only a proportion of the Government revenue. They also prayed for an injunction restraining the appellant from

executing his fraudulent decrees; but it appears that, after the institution of the suits, the decrees were in fact executed, and this prayer, therefore, became infructuous and was ignored. The Subordinate Judge has found that the "light tribute" payable by the respondents is not rent, that the relationship of landlord and tenant has never existed between the appellant and the respondents, and that, therefore, the Settlement Officer was incompetent to assess any rent on the lands in suit. He has accordingly given the respondents a declaration to the effect that they are entitled to hold the lands granted to their ancestors by a former proprietor of the killah in lieu of maintenance on payment to the appellant of a proportionate share of the Government revenue. These decrees have been affirmed by the learned District Judge, and the proprietor has now appealed to this Court.

It is clear that, if the assessment of rent by the Settlement Officer in 1897 was made under section 104 of the Bengal Tenancy Act, 1885, his decision cannot now be questioned. This is laid down in express terms by section 107 of the Act, read with section 9 of the Bengal Tenancy (Amendment) Act, 1898 (Ben. Act III of 1898), which runs as follows:

"Every settlement of rent by a Revenue Officer under section 104 of the Bengal Tenancy Act, 1885, before the commencement of this Act, in respect of which no appeal has been preferred to the Special Judge appointed under section 108 of that Act, has the force and effect of the decree of the Civil Court in a suit between the parties, and shall be final."

Now, it is admitted, and it cannot be denied, that, if the respondents are tenants, no exception can be taken to the proceedings of the Settlement Officer. The question therefore resolves itself into one as to whether the respondents are tenants or not. Both the Courts below have held that they are not, and it has first been contended before us on behalf of the respondents that this is a finding of fact which cannot be reversed on second appeal. We think that there is no substance in the contention. The learned Subordinate Judge has found, *first*, that the lands in suit were granted to

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the ancestors of the respondents in lieu of maintenance and on the condition that the grantees would pay to the grantors a share of the Government revenue; *secondly*, that, as the grantees were bound to pay only a share of the Government revenue, they were never liable to pay "rent" to the proprietors; and, *thirdly*, that, therefore, neither the respondents nor their ancestors have ever held the lands as tenants under the proprietors, and the relationship of landlord and tenant has at no time existed between the two. Here, no doubt, we have certain findings of fact, and with these we cannot, of course, interfere; but the inference drawn from them is an inference of law, which is, in our opinion, open to revision by us. The findings amount to this, that the respondents hold these lands on payment to the appellant of sums of money proportionate to the Government revenue, and it seems to us that the true conclusion from this is that the respondents are tenants of the appellant.

The position of these holders of maintenance-grants in Orissa is described by Mr. Maddox at page 414 of his Orissa Settlement Report of 1900, where he discusses the incidence of tenure in killahjat estates. "In the first place," he writes, "the inheritance to the ownership is governed by the law of primogeniture, and from this arises the necessity of providing for the younger brothers of the family. This is done by assigning to the brothers and other near relatives villages or parts of the villages for their support, under such names *baradaran jagir*, *khoraposak niskar*, etc. These grants are generally heritable, but not transferable, and the head of the family claims the right to resume on the failure of direct heirs, and adoption is not recognised."

The question we have to decide is whether a person holding such a grant on condition of paying to the grantor a proportionate share of the Government revenue, is a tenant of the grantor within the meaning of the Bengal Tenancy Act of 1885. Section 3 (3) of that enactment defines a tenant as "a person who holds land under another person, and is, or, but for a special contract, would be, liable to pay rent for that land to

that person": and sub-section (5) of the same section defines "rent" as "whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant." Now, when we refer to the plaint in S. A. No. 1068 of 1907, we find it is there distinctly stated that the jagir in suit was held for maintenance on condition of the payment of an annual rent (*jama*) of so many rupees in proportion to the revenue (*rajashya*) of the killah. Again, when we look at the *rafanama*, which is relied upon in that appeal, we find it similarly stated that the maintenance jagir was to be held year by year on payment of a certain sum as the rent (*jama*) thereof to (not through) the proprietor, and that the revenue (*rajashya*) assessed on the land should be paid by the latter. And, as we have already shown, the Courts below have found that the respondents are liable to make, in respect of these lands, annual cash payments to the appellants. The result is that, on the respondent's own showing, as well as on the facts found, the lands are held in lieu of maintenance on payment of sums corresponding with a share of the Government revenue, and it seems to us that the sums so paid or payable are "rent." In this connection we may refer to the ruling of this Court in *Chunder Kant Chuckerbutty v. Mahomed Hussein* (1). This was a suit for the rent (or revenue) of land, which was held by the defendant as a proprietary taluk subordinate to the plaintiff. The defendant undertook to pay the revenue to the plaintiff, who was bound to pay the same to the Government, the money receivable from the defendant being part of the assets of the estate, and the whole estate being liable for default of revenue. It was held by the Judges that the rent (or revenue) assessed on the taluk might be the subject of a suit under the Bengal Rent Act, 1859. Adopting the *ratio decidendi* of that case, we hold that the respondents are clearly not co-proprietors, but tenants, that the existence of the relationship of landlord and tenant follows from the facts found, and that these appeals are entitled to succeed.

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(1) (1866) 6 W. R., Act X, 1.

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 MAHAPATRA.

We may add that the frame of the suits seems to us to be obviously bad. The foundation of them was fraud in obtaining the rent decrees of 1903 and 1904, and the cause of action was, in each instance, said to have occurred on the day on which the fraudulent decree was obtained. No particulars of the fraud suggested were, however, set forth in the plaints, while at the trial no attempt was made to substantiate fraud, but the entirely new case that the Settlement Officer's proceedings were *ultra vires* was made. It seems to us that, in these circumstances, it is very doubtful whether a declaratory decree ought to have been granted by any Court in the exercise of its equitable jurisdiction.

The result is that these appeals must be decreed, and the suits dismissed with costs throughout.

S. A. A. A.

Appeals allowed.

APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Richardson.

BALI PANDA

v.

JADUMANI SANTRA.*

1910
 Aug. 19.

Limitation—Hindu Deities—Suit for removal of Hindu Deities from one's custody to another's—Limitation Act (XV of 1877), Sch. II, Arts. 49, 20, 145.

A suit by *Thakurs* (deities) themselves for removing themselves from the custody of the defendants to the custody of the plaintiffs other than themselves is not a suit for a moveable property. It would be a suit for which no provision is made in the Limitation Act, and would therefore naturally come under Art 120 of Schedule II of the Act unless any other Article also applied. Article 49 has no application to such cases.

SECOND APPEAL by the plaintiffs Nos. 3 to 6.

Plaintiffs Nos. 3 to 6 as *marfatdars* of the *Thakurs* Gopeenath and Raghunath sued for a declaration that they were entitled to the custody of the *Thakurs* and for recovery of

* Appeal from Appellate Decree, No. 1220 of 1909, against the judgment of J. J. Platel, District Judge of Cuttack, dated March 5, 1909.

possession of the same. The *Thakurs* themselves were the plaintiffs Nos. 1 and 2. The defendant, in whose house the *Thakurs* were located for many years, pleaded that plaintiffs Nos. 3 to 6 were not *marfatdars*, but merely *pujaries*, who had no right to remove the *Thakurs*. The Munsif decreed the suit, holding that a *Thakur* is not moveable property in the eye of law, but a juridical person. On appeal, the District Judge reversed the decision of the Munsif, and dismissed the suit, holding that, for the purposes of the suit, the *Thakur* must be regarded as moveable object, and Art. 49 of the Limitation Act would apply. The plaintiffs thereupon appealed to the High Court.

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SANTRA.

Babu Kshettramohan Sen, for the appellants. The decree of the lower Appellate Court is self-contradictory. *Thakur* once consecrated must be regarded as a juridical person. *Thakur* is a perpetual minor, and this suit must be regarded as a suit by the *Thakur* through their *shebait*s to have themselves placed in proper custody. Art. 49 of the Limitation Act cannot apply: see *Gossami Sri Gridhariji v. Romanlalji Gossami* (1). There is no limitation. Assuming that the *Thakurs* are moveable properties, the defendant must be treated as bailee, and Art. 145 would apply. At least Art. 120 would apply.

Babu Pravashchandra Mitra, for the defendant. Art. 49 governs the case. This is a suit for the removal of the *Thakur*. Here the physical possession of the *Thakur* is a valuable right, and, so far as the claim for such physical possession goes, it is a claim for the possession of a moveable: *Subbaraya Gurukul v. Chellappa Mudali* (2). The argument that Art. 145 would apply was not advanced in the lower Courts, and the question whether the defendant was in the position of a bailee was not gone into. A suit for the removal of a *Thakur* is not maintainable.

CHATTERJEE J. *Thakur* Gopeenath Deb and *Thakur* Raghunath Deb were the plaintiffs Nos. 1 and 2, the other

(1) (1889) I. L. R. 17 Calc. 3, 22. (2) (1881) I. L. R. 4 Mad. 315.

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plaintiffs being the *shebait*s or *marfatdars*. The allegation in the case was that the old temple of these *Thakurs* having been blown down by a storm, they were placed in the temple of the defendants, which was near by. Subsequently, on account of a dispute between the *shebait*-plaintiffs and the defendants, the defendants brought a suit for recovery of possession of certain lands dedicated to these *Thakurs*, on the ground of their being the *shebait*s or *marfatdars* of these *Thakurs* and the present *shebait*-plaintiffs being the *pujaries*. In that suit one of the principal issues was whether these *Thakurs* were the family *Thakurs* of the plaintiffs in that case, and it was decided that the plaintiffs in that case were not the *marfatdars*, but that the defendants were the *marfatdars* of these *Thakurs*. After that, the *shebait*-plaintiffs rebuilt the temple of the *Thakurs*, and wanted to bring them to the new temple. They were opposed by the defendants. Hence this suit, as stated above, by the *Thakurs* and the *shebait*-plaintiffs.

The main prayer in the case is that the *Thakurs* may be taken out of the temple of the defendants and placed in their own new temple, so as to be in the custody of the plaintiffs Nos. 3 to 6.

The first Court decreed the suit. The Court of Appeal below has dismissed it, on the ground that it is barred by Art. 49, Schedule II, of the Limitation Act of 1877. It has at the same time made a declaration in favour of the plaintiffs Nos. 3 to 6 that they are the custodians of the *Thakurs*.

The decree, therefore, is self-contradictory. To say that the plaintiffs are the custodians of the *Thakurs*, and at the same time that the plaintiffs are barred from recovering possession of the *Thakurs*, is a contradiction in terms.

It has, however, been contended before us that the judgment of the lower Appellate Court is wrong, and that Art. 49 has no application to this case. We think that this contention is right.

The suit, if it is considered as a suit by the *Thakurs*, for removing themselves from the custody of the defendants to the custody of the plaintiffs Nos. 3 to 6, and being placed in

their new habitation, is not, in any sense of the term, a suit for a moveable property. It would be a suit for which no provision is made in the Limitation Act, and would therefore naturally come under Art. 120 of the Schedule, unless any other Article also applies. It has been found by the learned Judge that obstruction was made to the worship of the *Thakurs* being conducted by the plaintiffs Nos. 3 to 6 during the pendency of the previous suit of 1903. The present suit being filed on the 6th February 1907, was well within six years, and therefore it was not barred by limitation.

In this view of the case it is not necessary to consider whether the *Thakur* is to be considered a moveable property. Besides, a *Thakur* has been held to be a juridical person, and, considering the claim as it is made in this case, I do not see why it should not be held that the *Thakur* is a juridical person, and is therefore not amenable in any sense to the mischief of Art. 49.

It was contended that Art. 145 might apply, because, under the circumstances, the defendants would be bailees or depositaries. It is, however, not necessary to consider that question.

The appeal is, therefore, decreed with costs.

RICHARDSON J. I agree that the suit is not barred by limitation under Art. 49. Applying either Art. 120 or Art. 145, the suit is within time. I concur, therefore, in the order proposed by my learned brother.

Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice D. Chatterjee and Mr. Justice Richardson.

1910

 Sept. 1.

PRATAP UDAINATH SHAH DEO

v.

MADAN MOHAN NATH SABI.*

Execution of decree—Rent-decree—Limitation—Chota-Nagpur Encumbered Estates Act (Beng. VI of 1876), ss. 3, 12 Chota-Nagpur Encumbered Estates Amendment Act (Beng. III of 1909), s. 4.

The words "Civil Courts" in section 3 of Act VI of 1876, as amended by section 4 of Act III B. C. of 1909, are comprehensive enough to include the Revenue Courts deciding rent-suits and executing rent-decrees.

Nilmoni Singh Deo v. Taranath Mukerjee (1) followed.

APPEAL by Maharaja Pratap Udainath Shah Deo, the decree-holder.

The Deputy Collector of Ranchi passed a rent decree against the respondent in this case on the 19th April 1905. The decree-holder applied for its execution for the first time on the 13th February 1909. The judgment-debtor filed an objection that, among other things, the decree should not be executed, as time-barred. It was alleged by the decree-holder that the property of the judgment-debtor was under the management of the Encumbered Estates Department from the 23rd May 1906 to the 21st April 1908, that the decree could not be executed within this time, and that if the above period be deducted from calculation, the application for execution was in time. The Deputy Collector, however, held, on the opinion of the Legal Remembrancer, contained in his letter No. 609 W., dated the 17th November 1908, to the address of the Commissioner of the Chota-Nagpur Division, that a superior landlord can take out execution proceedings in a Revenue Court on a decree obtained in a Revenue Court,

* Appeal from Order, No. 456 of 1909, against the order of Sarat Chandra Chatterjee, Deputy Collector of Ranchi, dated July 27, 1909.

(1) (1882) I. L. R. 9 Calc. 295; L. R. 9 I. A. 174.

and that, the decree-holder having omitted to do so within three years of the decree, his application for execution was time-barred.

The decree-holder thereupon appealed to the High Court.

Mr. A. Chaudhuri (Babu Jogesh Chandra De with him), for the appellant. Revenue Courts are Civil Courts. They adjudicate civil rights of parties. No statutory definition is necessary. Certain Revenue Courts have a special procedure of their own. Some of them have an exclusive procedure of their own, and, although questions had arisen from time to time as to whether the Civil Procedure Code was applicable where no special procedure had been laid down in rent enactments, it could not be said that Revenue Courts were not Civil Courts: see *Nilmoni Singh Deo v. Taranath Mukerjee* (1). The Chota-Nagpur Tenancy Act had provided for the application of the Civil Procedure in certain matters: see sections 76, 98, 144, 145, etc. The object of the Encumbered Estates Act is to relieve encumbered zemindars in respect of all claims.

Babu Naliniranjan Chatterjee (Babu Bepin Chandra Mallik with him), for the respondent. There is a clear distinction between Revenue Courts and Civil Courts. Section 126 of the Chota-Nagpur Tenancy Act gives a right of suit in the Civil Court to a dissatisfied claimant. Section 3 of Act VI of 1876 excluded rent-decrees. If acknowledgment of debt is relied upon as taking the case out of the statutory period of limitation, the date of such acknowledgment should be fixed; but there are no materials in the record for such ascertainment, and it would be necessary to remand the case for further inquiry.

Cur. adv. vult.

CHATTERJEE J. The appellant obtained a decree for arrears of rent on the 19th of April 1905. The estate of the judgment-debtor was in charge of the Encumbered Estates Department at Manbhum from 23rd May 1906 to the 21st April 1908, on which last date it was released.

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The decree-holder applied for execution on the 13th February 1909, *i.e.*, more than three years from the date of the decree. The judgment-debtor pleads limitation, and the decree-holder seeks to save his application from the bar, on the ground that he was debarred by the provisions of the Encumbered Estates Act, VI of 1876, from taking out execution during the period of the management under the Act. The Court below has given effect to the plea of the judgment-debtor, holding that, under a certain interpretation of the Act by the Legal Remembrancer of Bengal, followed by a legislative recognition of that interpretation by the amendment of the Act of 1876, the decree-holder was not debarred from executing his decree, and that the application is therefore barred.

On appeal it has been contended by the decree-holder that the lower Court is wrong. Section 3 of Act VI of 1876 enacted that, as soon as an estate is taken charge of under the Encumbered Estates Act, all proceedings pending in Civil Courts in respect of the debts and liabilities of the disqualified owner shall be barred; he shall not be arrested for such debts; his moveable property shall not be attached by the Civil Court, and his immoveable property shall be exempt from civil process. This was the state of the law when the Legal Remembrancer in 1908 gave an opinion that the words "Civil Courts" in the section meant Civil Courts pure and simple, and did not include Revenue Courts dispensing civil justice, and the Act was amended in 1909 by the addition of the words "Revenue Court," etc. The appellant contends, on the authority of *Nilmoni Singh Deo v. Taranath Mukerjee* (1), that the words "Civil Courts" in section 3 of Act VI of 1876 are comprehensive enough to include the Revenue Courts deciding rent-suits and executing rent-decrees, that the opinion of the Legal Remembrancer is wrong, and that the amendment of section 3 by Act III of 1909 only clears up the meaning of the original section. On the other hand, it is contended by the respondents that the amendment shows that

(1) (1882) I. L. R. 9 Calc. 295; I. R. 9 I. A. 174.

the Revenue Courts could not have been meant to be included in the words "Civil Courts." The object of the Act being to give relief to encumbered zemindars against all sorts of claim, it cannot for a moment be believed that the Legislature did not mean to keep the zemindar from all sorts of debts and liabilities, including rent-suits and decrees. The judgment of their Lordships of the Privy Council makes this quite clear, and any opinion of Mr. Chapman to the contrary is therefore wrong. The amendment under section 4 of Act III of 1909, B.C., was made for the purpose of meeting this difficulty and removing all doubts. The amendment virtually adopted the decision of the Privy Council, and cannot be said to have altered the law. Under section 12 of the Act the debts, etc., barred under section 3 are revived when the estate is released, and, as the release was in 1908, the application for execution in 1909 was quite within time.

It also appears that the judgment-debtor mentioned the decree of the decree-holder as one of his debts in his petition for relief under the Encumbered Estates Act in 1906. That might amount to an acknowledgment of debt by the judgment-debtor, which would most probably give a fresh start to the decree-holder. If it were necessary to go into this question, we should have remanded the case or called for further evidence, as the documents containing these acknowledgments are not on the record, although they are said to have been before the Court below. As, however, we hold for the decree-holder on the first point, it is not necessary to remand the case. The appeal is decreed with costs.

RICHARDSON J. I concur in my learned brother's conclusion. The debt here is a judgment-debt supported by a decree of a Revenue Court, being a Court for the recovery of rent. While the debtor's estate was under the charge of the Encumbered Estates Department, the Court which passed the decree was, in my opinion, debarred from executing it by the provisions of section 3 of the Chota-Nagpur Encumbered Estates Act (VI of 1876) before that section was amended by

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Act III (B.C.) of 1909. The mere fact that Revenue Courts of the description in question are governed by a special procedure does not prevent them from being Civil Courts. The term "Civil Courts" is wide enough to include such Revenue Courts, although, for the purpose of the Civil Procedure Code, the term "Revenue Courts" does not include Civil Courts of a particular kind, namely, Civil Courts having original jurisdiction under the Code to try rent-suits. To my mind there is nothing in section 4A of the Code of 1882, re-enacted in substance in section 5 of the Code of 1908, which is inconsistent with the decision of the Privy Council in *Nilmoni Singh Deo v. Taranath Mukerjee* (1), that the Rent Courts established by Act X of 1859 are Civil Courts. Section 4A was introduced into the Code of 1882 in the year 1888, apparently for the purpose of mitigating the consequence flowing from that decision, viz., that the provisions of the Civil Procedure Code were capable of being applied to Rent Courts (or Revenue Courts for the recovery of rent) in those matters of procedure as to which the special Acts creating them, or by which they were governed, were silent. The consequence, so far as it extends, is accepted in the section, and, by way of mitigation, a power is given to the Government where provisions of the Code are applicable to Revenue Courts owing to the silence of the special enactments relating to those Courts to declare that such provisions shall not apply to those Courts, or shall only apply to them with such modifications as may be prescribed.

In any case the Act of 1876, with which we are concerned here, was passed before the decision of the Privy Council, and was not amended in consequence of that decision. Nor does there appear to be anything in the law relating to the Rent Courts of Chota-Nagpur, which makes the principle of the Privy Council decision inapplicable to them. As to the amendment of the law introduced by Act III (B.C.) of 1909, I do not think it can have the effect of taking out of the term "Civil Court," any Revenue Court previously in-

(1) (1882) I. L. R. 9 Calc. 295; L. R. 9 I. A. 174.

cluded in that term, though it may have the effect of bringing within the operation of section 3 of the Encumbered Estates Act any Revenue Courts in Bengal which are not also Civil Courts.

In regard to the provisions of section 7 of the Encumbered Estates Act, it is clear that an execution barred by section 3 is revived by section 12, and it is therefore unnecessary for the purpose of the present case, to consider the precise effect of the exclusion of "rent due to the superior landlord" from the bar imposed by section 7: *Kameshar Prasad v. Bhikhan Narain Singh* (1).

S. M.

Appeal allowed.

(1) (1893) I. L. R. 20 Calc. 609.

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CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Doss.

LAL MOHAN MANDAL

v.

KALI KISHORE BHUIMALI.*

1910
Sept. 30.

Appellate Court—Power to alter conviction under s. 147, Penal Code, to one under s. 323, when the common object charged was other than to cause hurt—Issue of Rule and order for bail by the High Court—Duty of the Magistrate on receiving intimation of the same by telegram from Counsel—Delay in transmitting the Bail orders—Criminal Procedure Code (Act V of 1898), s. 423.

The Appellate Court cannot alter a conviction of rioting under s. 147 of the Penal Code, with the common object of ejecting the complainants from their homestead lands, to one under s. 323 thereof.

When a Rule is issued by the High Court and the proceedings stayed, and, *a fortiori*, when an order for bail is made, the Magistrate, on receiving reliable information thereof, such as a telegram from the counsel in the case, is bound to act on it immediately, though he has not received the High Court's orders at the time.

Ratnessari Pershad v. Empress (1) followed.

All bail orders must be issued from the office of the High Court on the same day they are passed, irrespective of the written order on the record.

* Criminal Revision, No. 1172 of 1910, against the order of G. C. Chatterjee, Additional District Magistrate of Dacca, dated Aug. 12, 1910.

(1) (1898) 2 C. W. N. 498.

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LAL
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MANDAL
v.
KALI
KISHORE
BHUMALI.

On the 3rd May 1910 a quarrel arose between the complainants, Kali Kishore Bhumali and Ram Kamal Bhumali, and the petitioners and others, out of a dispute relating to the possession of certain homestead lands which led to a mutual fight in the course of which both parties received injuries. The petitioners were placed on trial before a Bench of Magistrates at Munshigunge, in the district of Dacca, charged, under s. 147 of the Penal Code, with rioting, with the common object of ejecting the complainants from their homestead lands, and were convicted and sentenced thereunder, on the 21st July, to six and three months' rigorous imprisonment, respectively. The Bench found that the petitioner, Lal Mohan Mandal, struck the complainants with a *lathi*, and that the petitioner, Chandra Mohan Mandal, though unarmed, was present co-operating with the other assailants. On appeal the Additional District Magistrate of Dacca doubted whether the petitioners' party consisted of five or more persons, but he was of opinion that both the petitioners beat the complainants, and accordingly altered the conviction to one under s. 323 of the Penal Code, and reduced the sentences to 15 days by his order dated the 12th August.

The petitioners surrendered on the 30th August, and moved the High Court and obtained a Rule, on the 5th September, with an order of *interim* bail. On the same day their Counsel wired to the Sub-Divisional Officer, informing him of the issue of the Rule and the bail order; but the petitioners were not released owing to the High Court's orders not having reached the District Magistrate till after the sentences had been served out.

Mr. B. M. Chatterjee and Babu Bhupendra Chunder Guha,
for the petitioners.

Babu Manmatha Nath Mukerji, for the opposite party.

HOLMWOOD AND DOSS JJ. This is a Rule calling upon the District Magistrate of Dacca to show cause why the convictions of, and sentences passed upon, the petitioners, under section 323 of the Indian Penal Code, should not be set aside on the

ground that there was no charge against them under that section, and that the common object charged for the riot did not specify the intention to cause hurt.

It is admitted that the conviction cannot stand on the ground set out in the Rule; but we are asked to order a re-trial. No doubt, it would have been our duty to order a re-trial, had it not been for the fact that the petitioners have undergone the sentence of 15 days' rigorous imprisonment, which was passed against them in modification by the lower Appellate Court. It appears, however, that at the time we issued the order for bail, on the 5th September 1910, the petitioners had only actually served seven days; and we cannot understand how it was that our order did not reach the District Magistrate for eight days. But, beyond this, we understand that the learned counsel who obtained the Rule took the trouble to telegraph to the District Magistrate's Office, informing him of the result of the application; and it has been laid down by this Court in more than one case, of which we need only cite that of *Ratnessari Pershad v. Empress* (1), that when a Rule is issued by the High Court and the proceedings stayed, and therefore, *à fortiori*, when there is an order for bail, the Magistrates on receiving reliable information thereof should stay their hands then and there.

Another matter in connection with this case is the delay which took place in the office of this Court. We had reason to complain of a similar delay during the course of the present week, and we must lay down most stringently that all bail orders be issued on the very day on which they are pronounced by the Judges sitting on the Bench, irrespective of the written order on the record. The Rule is made absolute, and the convictions and sentences are set aside.

E. H. M.

Rule absolute.

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(1) (1898) 2 C. W. N. 498.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Fletcher.

1910

Nov. 7.

KHAGENDRA NATH MITTER

v.

BHUPENDRA NARAIN DUTT.*

Nuisance—Public and private nuisance—Erection of a high wall on one's own land very close to another's dwelling house—Likelihood of injury to the health of the inmates of the adjoining tenements and of the public inhabiting the neighbourhood by the propagation of disease—Propriety of order of partial demolition—Feasibility of other remedial measures—Calcutta Municipal Act (Beng. III of 1899) s. 632.

The words "any nuisance" in s. 632 of the Calcutta Municipal Act mean any nuisance as defined in s. 3 (29) thereof. The definition, though wider than that of a "public nuisance" at the Common Law, does not extend to the inclusion of all private nuisances.

Bhagwan Das v. Rash Behari Mullick (1) explained.

• The erection of a wall, however high, on one's own land very close to the dwelling-house of a neighbour, in order to prevent him from acquiring a right of easement, is not in itself a nuisance under the Calcutta Municipal Act, but where the evidence shows that it is, or is likely to be, injurious to the health of the residents of the adjoining tenements and of the public inhabiting the neighbourhood, by propagating the seeds of consumption and typhoid, it becomes a nuisance under the Act.

Where, however, the only matter which causes a wall to be a nuisance is not its height but the accumulation of filth at the bottom and want of space to clear the drainage between it and the adjacent house, the Magistrate, instead of ordering its reduction in height, should consider whether the nuisance cannot be abated by the adoption of other remedial measures.

The use of the Act for the purpose of interfering in any way with the rights of private ownership, beyond the limited powers given to the Corporation by it for the necessary protection of the public and the enforcement of proper sanitation, is much to be deprecated.

THE petitioner was the owner of the premises No. 80, Bechu Chatterjee's Street, in the town of Calcutta, adjoining the premises No. 79, belonging to Bhupendra Narain Dutt,

* Criminal Revision, No. 1088 of 1910, against the order of Amrita Lal Mookerjee, Municipal Magistrate of Calcutta, dated July 30, 1910.

(1) (1909) 14 C. W. N. 637.

the opposite party. In 1894 the latter built a dwelling-house, extending to the edge of his land, with two verandahs and windows, and made a few small apertures in his wall overlooking petitioner's premises. The petitioner thereupon erected, in November 1909, an unplastered wall on his own land, forty feet high, extending along the opposite party's house on the west. The latter, after ineffectual attempts to induce the Corporation to move in the matter, complained to the Municipal Magistrate, under s. 632 of the Act, alleging that the wall had caused diminution of light and air, rendering the rooms on the western side of his house, with the verandahs and the privy, absolutely dark and almost unfit for human habitation, that there had formed deep crevices and holes between it and his building, which could not be properly cleaned, with the result that rubbish and other offensive materials had accumulated there, breeding mosquitoes and germs dangerous to health, and that the wall had encroached on his land, injured his building, and depreciated its value. The petitioner filed a written statement claiming an absolute right to build the wall, denying that it was injurious to health or property, and contending that it was not a nuisance under the Act, and objecting that the matter was one cognizable by the Civil Courts, and not by the Municipal Magistrate. The Health Officer of the Corporation deposed that the wall was a nuisance, because it had darkened the whole of the western side of the building, especially the verandahs, shut out the ventilation, and favoured the congregation of mosquitoes in the privy. He further stated that it was likely to affect the health of the inmates occupying this side of the building by its interfering with the free ventilation of the rooms, verandahs, and the privy, that the deficient ventilation so caused would favour consumptive tendencies, and sore throat and fever might result from the inhalation of pent-up sewer gas. Major Bird gave evidence to the effect that the wall might prejudicially affect the health of the occupants by excluding light and air, and render the house more humid, and develop diseases arising from humidity. He was also of opinion that mosquitoes might develop giving

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rise to malaria, and that the space between the wall and the building would, from the collection of stagnant water, form a breeding ground for disease germs, such as typhoid. Krishna Chunder Banerji, a retired Superintending Engineer, deposed that the joints of the eastern face of the wall were open and likely to harbour vermin, that it made the rooms dark, uncomfortable and insanitary, and the building less secure, besides being an encroachment. Mr. Johnstone, examined for the defence, also admitted that the fissures between the bricks might harbour insects and worms, which, during the rains, would fall between the wall and the building, and that the wall would make the latter damp if the water was not drained away.

The Municipal Magistrate found upon the evidence, by his order dated 30th July 1910, that the wall was a nuisance under s. 3 (29), as being injurious to health and rendering the building opposite less secure, besides depreciating its value, and directed the Chairman, to demolish it to 12 feet from ground level. The petitioner thereupon obtained the present Rule to set aside the order on the ground that it was made without jurisdiction.

Babu Baidya Nath Dutt and Babu Charu Chandra Dey,
for the petitioners.

Mr. A. N. Chaudhuri, Babu D. N. Bagchi and Babu Sachindra Prosad Ghose, for the opposite party.

HOLMWOOD J. This was a Rule calling upon the Municipal Magistrate to show cause why his order, dated the 30th July 1910, should not be set aside on the ground that it was passed without jurisdiction. The order is in respect of a wall nearly forty feet high, which has been erected by the petitioner between his premises and the adjoining premises of the complainant, 79 and 80, Bechu Chatterjee's Street. There was a wall to mark the boundary on approximately the same site before, but this was only a low wall, and met with no objection. It is contended by the complainant

that the new wall has partly encroached on his land, but with this we have nothing to do, as that, like many other questions that have been discussed in this case, is a purely civil matter.

I may say, at the outset, that I most strongly deprecate the use of the Municipal Act for the purpose of interfering in any way with the rights of private ownership beyond those limited powers which the Corporation have obtained by statute for the necessary protection of the public and the enforcement of proper sanitation. A great deal has been said in this case about the distinction between a public and private nuisance. A public nuisance is one that affects the King's subjects at large, or a considerable portion of them, such as the inhabitants of a town. A private nuisance, on the other hand, is one that affects only one person, or a certain determinate number of persons, and is only amenable to the civil law. But in section 632 of the Municipal Act (Bengal, III of 1899), the Chairman, or any person who resides in Calcutta, is empowered to complain to a Magistrate of the existence of any nuisance, and this must be taken to be any nuisance under the Act as defined in section 3, clause (29). Now, under that section, "nuisance includes any act, omission, place or thing which causes, or is likely to cause, injury, danger, annoyance or offence to the sense of sight, smell or hearing, or which is, or may be, dangerous to life, or injurious to health or property."

This definition is wider than the Common Law definition of "public nuisance," but does not certainly extend to the inclusion of all private nuisances as was sought to be argued on the authority of *Bhagwan Das v. Rash Behari Mullick* (1). I do not think that the learned Judges who decided that case intended to lay down any such general proposition as that which has found its way into the head-note of the case, of course without the revision of the learned Judges themselves. They are dealing with a particular case, where an act of private ownership, primarily only creating a private nuisance, produces results which bring it within the definition of a nuisance in section 3 of the Act. The word "includes" shows that such

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acts are rendered amenable to Municipal Law as opposed to Penal Law over and above what is generally understood as a "public nuisance." The acts themselves are in the nature of public nuisances, but they may only affect the lives and property of individuals or defined bodies of persons resident in a specified area. The smallest infant residing in its parents' house within the jurisdiction of the Corporation of Calcutta has a right to have its life and health protected against any act of any person which is, or may be, a danger to it, and the distinction between a "private" and "public nuisance" becomes in this view of the matter purely academical.

The question is, has a nuisance been created by any act of the petitioner that falls within the definition as given in the statute. If it has, the Municipal Magistrate clearly has jurisdiction under clause (2) of section 632 to make such inquiry as he thinks necessary, and, if he sees fit, to direct the Chairman to exercise any of the powers vested in him by the Act, or to take such measures as to such Magistrate may seem reasonable and practicable for preventing, abating, diminishing or remedying such nuisance.

Now the building of a wall, however high, on a man's own property, for the purpose of preventing his neighbour from acquiring rights of easement over his land is not in itself a nuisance under the Act. That is a question for the Civil Courts, and I wish to carefully guard myself from being thought to derogate in any way from the private rights of ownership in these matters, on the mere averment that a private nuisance has been created.

But the findings in this case go beyond that, and bring the case strictly within the definition of a *quasi*-public nuisance, as it is defined in the Act. Passing over certain findings, which do not concern the question of nuisance as defined in the Act, but are purely civil matters, I find that it has been found, as a fact, on the evidence of the Health Officer of Calcutta and of one of the leading Presidency Surgeons, whose testimony is wholly independent and unimpeachable, that the wall in question is, or may be, injurious to health, and as it is likely, in

their opinion, to propagate the seeds of consumption and typhoid fever, it is unquestionable that it creates a plague spot in the midst of a populous area which, commencing with the inhabitants of the adjoining tenements, including the petitioner himself and his family, may become a very serious menace and nuisance to the public inhabiting that neighbourhood.

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This being so, the wall clearly falls within the definition of a nuisance, as defined in section 3 of the Act, and we may pass over the further finding that it affects the security of the complainant's building, although that also finds some support from the testimony of Mr. Johnstone, who was called as an expert by the defence.

On this ground alone, I am unable to find that the Magistrate had no jurisdiction to deal with the matter. But the further question arises whether he has exercised that jurisdiction properly. The only matter which causes the wall to be a nuisance, within the meaning of the Act, is not its height, but the accumulation of filth and want of space to clear the drainage between it and the opposite party's house. Now, this might conceivably be remedied by other action short of pulling down the wall to a height of 12 feet, and, indeed, it is difficult to see how the reduction of the wall to such a height gets rid of the nuisance actually found to exist under the Act. It is clear that arches in the lower part of the wall would serve the purpose of cleaning the space behind it, and would not interfere with the petitioner's screening off his premises from the opposite party's observation, which he is legally entitled to do. I, therefore, think that the case must go back to the Municipal Magistrate for further consideration and for passing such an order as will abate the nuisance, which is found to exist at the foot of the wall and behind it, without interfering with the petitioner's right to screen off his premises.

With reference to the insanitary irregularities in the surface of the wall, he must further consider whether the petitioner's offer to plaster and whitewash the surface of the wall opposite the objector's premises will not sufficiently meet the

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necessities of the case. With these remarks, the case is remanded to the lower Court for passing a reasonable and proper order for abating the nuisance.

FLETCHER J. concurred.

S. H. M.

Case remanded

CRIMINAL REFERENCE.

Before Mr. Justice Chitty and Mr. Justice Carnuluff.

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 Dec. 8.

HARU TANTI
 v.
 SATISH ROY.*

Compensation to accused—Order of compensation made in a separate proceeding after and not in the order of discharge—Legality of the proceeding—Criminal Procedure Code (Act V of 1898) s. 250 prov. (b).

Section 250 of the Criminal Procedure Code requires that before a Magistrate makes it a ground for discharging an accused that the complaint was frivolous and vexatious he shall hear the complainant on that aspect of the case, and unless he does so the order of compensation is without jurisdiction.

The order awarding compensation must be contained in the order of discharge or acquittal and not passed in a separate proceeding after the accused has been discharged or acquitted.

In the matter of the complaint of Sajdar Husain (1) followed.

ONE Haru Tanti instituted a case under s. 448 of the Penal Code against Satish Roy and Syed Seikh. The Sub-divisional Magistrate of Asansol who tried it discharged the accused, on the 3rd September 1910, and called upon the complainant to show cause why he should not pay Rs. 20 to each of the accused as compensation under s. 250 of the Code. On the 6th instant he directed Haru Tanti to pay Rs. 10 to each of the accused. The Sessions Judge of Burdwan referred the case under s. 438 of the Code to the High Court recommend-

* Criminal Reference, No. 265 of 1910, by E. B. H. Panton, Sessions Judge of Burdwan, dated Nov. 24, 1910.

(1) (1903) I. L. R. 25 All. 315.

ing a reversal of the order upon the authority of *In the matter of the complaint of Safdar Husain* (1).

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CHITTY AND CARNDUFF JJ. For the reason given by the learned Sessions Judge, and following the decision of Banerji J., in *In the matter of the complaint of Safdar Husain* (1), we set aside, as having been made without jurisdiction, the order awarding compensation in this case.

The course taken by the Sub-divisional Magistrate in including in his order for the discharge of the two accused an order calling on their accuser to show cause why he should not pay them compensation, and subsequently, after hearing the accuser, making the award, may seem to be perfectly fair and reasonable; but it does not fulfil the requirements of section 250 of the Criminal Procedure Code. What that section evidently contemplates, and if carefully read will be found expressly to require, is that, before a Magistrate makes it the ground or a ground for discharging a person complained against that the complaint was frivolous and vexatious, he shall hear the complainant on that aspect of the case, and, unless he does this, the whole proceeding as to compensation is bad.

E. H. M.

(1) (1903) I. L. R. 25 All. 315.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

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v.

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Search without warrant—Power of the police to search the house of an absconding offender generally for stolen property on information of dacoity against him—Legality of search—Criminal Procedure Code (Act V of 1898) ss. 94 and 165—Rioting—Common object to resist such search—Right of private defence—Penal Code (Act XLV of 1860) ss. 99, 147, 323, 353.

Section 165 of the Criminal Procedure Code does not authorize a general search for stolen property in the house of the absconding offender, against whom an information has been laid of having committed a dacoity.

It refers only to specific documents or things which may be the subject of a summons or order under s. 94 of the Code, and the latter does not extend to stolen articles or any incriminating document or thing in the possession of the accused.

Ishwar Chandra Ghoshal v. Emperor (1) referred to.

Where a Sub-Inspector, on receiving information of the commission of a dacoity, searched the house of one of the alleged offenders, accompanied by the complainant and the village officers, but without a search warrant, whereupon they were beaten by the petitioners who were charged with, and convicted of, rioting, with the common object of resisting the search, assault and causing hurt, under ss. 147, 323 and 353 of the Penal Code:—

Held, that the search was illegal, and that, the common object having failed, the conviction under s. 147 was bad.

THE petitioners were tried by the Sub-divisional Officer of Hajipur and convicted, all under s. 147, five under s. 323, and two of the latter under s. 353, of the Penal Code, and sentenced to various terms of imprisonment, on the 5th August 1910. They were also bound down under s. 106 of the Crimi-

* Criminal Revision, No. 1256 of 1910, against the order of F. W. Ward, Sessions Judge of Mozufferpur, dated Aug. 25, 1910.

(1) (1908) 12 C. W. N. 1016.

nal Procedure Code to keep the peace for two years. On appeal the Sessions Judge of Mozufferpur affirmed the convictions, but modified the sentences.

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The facts were as follows: On the 29th April 1910 Ramphal Singh, a Rajput living in the village of Fatehpore, reported to the Sub-inspector of Raghapur thana that a dacoity had been committed at his house by certain *gowallas* of Rampore, an adjoining village, and that Bajrangi with others had taken away some of the property. A first information was drawn up, and the Sub-inspector went to Rampore in the morning, accompanied by three constables and a duffadar. Ramphal met them a little later with one Damri, and the president and the collecting punchayat arrived shortly after. Sheodhan Singh, one of the constables, was sent to bring the accused and two search witnesses, but returned only with one Bhugwan Bhakat, being unable to find the others. The party then went to the house of Bajrangi, and the Sub-inspector entered it with Ramphal, Sheodhan, Bhakat, and the president and collecting panchayat. They found there only Bajrangi's mother. The open rooms were first searched, and in one of them was found a piece of cloth which Ramphal claimed as his, but which was said by Bhakat to belong to Bajrangi. About this time, on the cry of one of the females, a crowd of *gowallas* assembled outside, and shouts of "mar mar" arose. The Sub-inspector and the others with him were beaten with *lathis* by the petitioners Bajrangi, Mithu, Mahadeo, Raghu-nandan and Sheolochan. The petitioners were then put on trial and convicted, as stated above.

The common object, as set out in the charge and found, was to resist the execution of a legal process, *viz.*, the search of Bajrangi's house by the police. The defence was that the Sub-inspector acted *malâ fide* in collusion with the Rajputs of Fatehpore, in order to disgrace the *gowallas*, between whom and the former there was enmity.

Moulvi E. Karim, for the petitioners.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

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HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling on the District Magistrate of Mozufferpore to show cause why the conviction of, and sentences passed on, the petitioners should not be set aside on the ground that the common object charged failed, and that the search for stolen property without a warrant was not a legal search, and, therefore, the petitioners had a right of private defence. We have heard the learned Deputy Legal Remembrancer showing cause against the Rule, and we are clearly of opinion that section 165 of the Criminal Procedure Code does not authorize a general search for stolen property. It speaks of a specific document or thing which may be the subject of summons or order under section 94, and it is clear that section 94 does not refer to stolen articles or to any incriminating document or thing in the possession of an accused person. The latter proposition has been laid down in the case of *Ishwar Chandra Ghoshal v. Emperor* (1). In this case, however, it is sufficient to hold that section 165 did not authorize a search for stolen property in the house of the absconding offender; and, remarkable as it may appear, there is no other section, admittedly, which would cover such a search. There was no search warrant under section 98 in this case. The search was, therefore, not a legal search, and two, at any rate, of the petitioners who were the part-owners and occupiers of the house had a right of private defence. The common object of the riot, therefore, failed, and the conviction under section 147 was also bad. But we see no reason to disturb the conviction under section 323. There was no justification for calling on the neighbours to beat the police after they had gone out of the hut, and we uphold that part of the conviction. But, as the sentence passed under section 323 was only one of three months' rigorous imprisonment, and we understand that the petitioners have already been four months in jail, the result of our order would be that they would be discharged from custody, unless they are liable to be detained in any other matter. The order under section 106 of the Criminal Procedure Code will be maintained. This

(1) (1908) 12 C. W. N. 1016.

order only affects Bajrangi Gope, Nithu Gope, Sheolochan Gope, Mahadeo Gope and Raghunandan Gope, the other petitioners having been acquitted on the only charges against them; the orders on them under section 106 will of course go with the conviction.

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Rule absolute.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

AMANAT SARDAR

v.

NAGENDRA BISWAS.*

1910
Dec. 15.

Appeal—Right of reply—Duty of Appellate Court to determine accomplice character of evidence—Criminal Procedure Code (Act V of 1898), s. 421—Practice.

The appellant has a right of reply to the Crown on the hearing of an appeal.

Promoda Bhusan Roy v. Emperor (1) followed.

The Appellate Court is bound to find specifically whether witnesses said to be accomplices are so or not, and to weigh their evidence accordingly.

THE accused, a boat manji, was put on trial before Babu Srish Chunder Ghose, Sub-Divisional Officer of Narail, on a charge, under s. 407 of the Penal Code, in respect of some tins of mustard oil alleged to have been entrusted to him by the complainant at the Ultadinghi ghat for carriage to Dumuriã, but sold by him at an intermediate station, and convicted and sentenced thereunder, on 10th June 1910, to two years' rigorous imprisonment. He thereupon preferred an appeal

* Criminal Revision, No. 1355 of 1910, against the order of L. Palit, Sessions Judge of Jessore, dated July 26, 1910.

(1) (1906) 11 C. W. N. xliii.

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against the order to the Sessions Judge of Jessore, who upheld the same on the 26th July 1910.

It appeared from the explanation submitted by the trying Magistrate that the Sessions Judge heard the senior pleader for the appellant, and then the pleader for the Crown, but refused to hear the defence pleader again in reply, observing that he did not desire any further arguments in the case. The accused then moved the High Court and obtained the present Rule.

Babu Manmatha Nath Mukerjee, for the petitioner.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. We are of opinion that this appeal should be re-heard on the three grounds on which the Rule was issued. The law under section 421 of the Criminal Procedure Code does not appear to be very precise, but it does lay down that the appellant or his pleader shall have a reasonable opportunity of being heard in support of the appeal. Now, this must be taken to include the possible right of reply, if necessary, for it is obvious that if the Crown in its reply raises any points or displaces, in the opinion of the learned Judge, the points which were raised in the opening, the appellant or his pleader will have no reasonable opportunity of supporting their case, unless they are allowed to reply, and that this is so has been laid down by a Bench of this Court in the case of *Promoda Bhushan Roy v. Emperor* (1).

As regards the other two points, the finding of the learned Judge is vague as to the question whether Shashi and Afsar are or are not accomplices. A mere statement at the end of his judgment that some of the witnesses may be suspected of being accomplices is not sufficient, for, it being affirmed by the defence that two important witnesses were as a matter of fact accomplices, he was bound to find either that they were or were not accomplices, and to have weighed their evidence accordingly.

As regards the third point, the entry, exhibit No. 4, has been explained in a certain way by the Magistrate who tried the case, but that explanation is disputed by the defence, and the learned Judge's judgment does not deal with the question. Therefore, it appears necessary for us to direct a re-hearing of the appeal, and we accordingly do so.

We leave the question as to the propriety of admitting the petitioner to bail to the learned Sessions Judge.

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CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Sharfuddin.

In re ABIRUDDIN AHMED.*

1910
Nov. 22.

Muktear—Dismissal from the roll on conviction of an offence implying moral turpitude—Application for re-instatement after a lapse of years—Deliberate omission to disclose the facts of enhancement of sentence and of an order directing his prosecution for making a false affidavit—Power of the High Court to re-instate a legal practitioner after disbarment—Grounds of re-instatement.

The High Court has power, when a legal practitioner has been dismissed for misconduct of any description, in the widest sense of the term, to re-admit him after a lapse of time, if he satisfies the Court that he has in the interval conducted himself honorably, and that no objection remains as to his character and capacity.

King v. Greenwood (1), *Anonymous case* (2), *In re Smith* (3), *In re Robins* (4), *In re Pyke* (5), *In re Pyke* (6), *In re Pyke* (7), *In re Brandreth* (8), *In re Barber* (9), *Boston Bar Association v. Greenwood* (10)

* Application No. 3443 of 1910 against an order of dismissal under s. 12 of the Legal Practitioners Act (XVIII of 1879), dated Jan. 28, 1903.

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| (1) (1760) 1 W. Black. 222. | (7) (1865) 34 L. J. Q. B. 220; |
| (2) (1853) 17 Beav. 475. | 6 B. & S. 707. |
| (3) Unrep. cited in 17 Beav. 477. | (8) (1891) 60 L. J. Q. B. 501. |
| (4) (1865) 34 L. J. Q. B. 121. | (9) (1854) 19 Beav. 378. |
| (5) (1845) 1 New Pract. Ca. 330. | (10) (1897) 168 Mass. 169; |
| (6) (1865) 6 B. & S. 703; | 46 N. E. 568. |
| 34 L. J. Q. B. 121. | |

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In re Palmer (1), *In re Boone* (2), *In re Treadwell* (3), *In re King* (4), *In re Enright* (5), *In re Burris* (6), *In re Essington* (7), *In re Weed* (8), *In re Newton* (9), *In re Simposn* (10), *In re Sullivan* (11), *Incorporated Law Institute v. Meagher* (12), *In re Pearson* (13), *In re Smith* (14), *In re Rupath Banerji* (15), *In re Kally Prosonno Chatterjee* (16), *In re Nobin Krishna Mookerjee* (17) followed.

Exparte Frost (18), *In re Haudane* (19), *In re Garbett* (20), *In re Poole* (21), *In re Abinash Chandra Moitra* (22), *In re Chanda Singh* (23) and *Smith v. Justices of Sierra Leone* (24) referred to.

In re Lamb (25) distinguished.

Where a muktear was struck off the roll on conviction of kidnapping a minor girl, under s. 363 of the Penal Code, under circumstances of an aggravated character, implying moral turpitude, and applied after seven years for re-instatement, but deliberately omitted to disclose the facts that the High Court had enhanced his sentence and had also directed his prosecution under s. 193 of the Penal Code for making a false affidavit in the course of a proceeding in revision, the application for re-instatement was rejected.

ON the 24th December 1900 one Hamidulla kidnapped a minor girl, named Nistarini, and a prosecution was instituted against him for such offence. During the pendency of the criminal proceedings she was sent to the Civil Hospital at Rampore Boalia by Mr. Rattray, a local Deputy Magistrate, for medical examination as to her age, and was accompanied by her mother, Chandrabala, and her uncle. As the girl was leaving the hospital, the petitioner, who was the muktear of

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| (1) (1894) 9 Ohio C. C. 55, 70. | (11) (1901) 185 Mass. 426; |
| (2) (1898) 90 Fed. 793. | 70 N. E. 441. |
| (3) (1896) 114 Cal. 24; | (12) (1909) 9 Com. L. R. 655. |
| 45 Pac. 993. | (13) (1872) Unrep. |
| (4) (1896) 54 Ohio 415; | (14) (1878) Unrep. |
| 43 N. E. 686. | (15) 1890 Unrep. |
| (5) (1897) 69 Ver. 317; | (16) (1885) Unrep. |
| 37 Atl. 1046. | (17) (1888) Unrep. |
| (6) (1905) 147 Cal. 370; | (18) (1815) 1 Chitty 558, note. |
| 81 Pac. 1077. | (19) (1841) 9 Dowl. Pr. Ca. 970. |
| (7) (1904) 32 Colo. 168; | (20) (1856) 18 C. B. 403. |
| 75 Pac. 394. | (21) (1869) L. R. 4 C. P. 350. |
| (8) (1904) 30 Mont. 456; | (22) (1909) I. L. R. 37 Calc. 173. |
| 70 Pac. 50. | (23) (1909) 11 C. L. J. 438; |
| (9) (1902) 27 Mont. 182; | 14 C. W. N. 521. |
| 70 Pac. 510, 982. | (24) (1848) 7 Moo. P. C. 174. |
| (10) (1903) 11 N. Dak. 526; | (25) (1889) 23 Q. B. D. 477. |
| 93 N. W. 918. | |

Hamidulla in the case, called her away and asked her to go with him, which she did. The petitioner and one Hematulla and another then took her a short distance, when the petitioner went away, leaving her with the two others. She was produced in Court the next day, and alleged that in the interval she had been kept in the petitioner's house. Hamidulla was convicted by the Deputy Magistrate of Rampore Boalia on the 6th September 1901 under s. 363 of the Penal Code, and his appeal dismissed by Mr. Lee, the Sessions Judge of Rajshaye, on the 28th November. He thereupon obtained a rule, which was made absolute on the 12th March 1902, on the ground that the Sessions Judge had refused to hear his pleader during the hearing of the appeal. The petitioner swore an affidavit in support of this allegation on the 17th December 1901. It appeared that the District Magistrate, on whom the rule was issued, had not communicated the allegation in the affidavit to Mr. Lee, who was then absent on inspection duty. On receiving the records from the High Court Mr. Lee reported to it that the statement was false, whereupon the Court issued a rule on the petitioner to show cause why he should not be prosecuted for making a false affidavit and why he should not be dismissed from the roll. The rule was made absolute on the 9th June, and the petitioner ordered to be prosecuted. The papers were sent for necessary action to the office of the Government Solicitor, but by some oversight the matter was overlooked, and no prosecution instituted.

In the meantime Chandrabala instituted a complaint against the petitioner, under s. 363 of the Penal Code, in respect of the kidnapping of Nistarini from the Civil Hospital. He was convicted thereunder by Mr. Rattray, and sentenced to six months' rigorous imprisonment. On appeal a re-trial was ordered, and the petitioner was again convicted and sentenced by the same Magistrate. An appeal from the latter order resulted in a fresh order of re-trial, and the case was ultimately transferred by the High Court to Mr. Twidell, Joint Magistrate of Rajshaye, for disposal. Mr. Twidell convicted the petitioner under s. 363 of the Penal Code, and

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sentenced him to one month's rigorous imprisonment on the 1st April 1902, holding that the object of the petitioner was not to have immoral connection with the girl, but to secure control over her as a witness in the impending kidnapping case against his client Hamidulla. On a reference of the case under s. 438 of the Criminal Procedure Code, the High Court enhanced the sentence, on the 18th June 1902, to six months' rigorous imprisonment.

On the 24th April 1902 the District Judge of Rajshaye reported the case of the petitioner under s. 12 of the Legal Practitioners Act (XVII of 1879), and recommended his dismissal. The matter came on for hearing before Prinsep and Stephen JJ., and their Lordships, by their order, dated 28th January 1903, held that the offence of which the petitioner was convicted was committed under circumstances of an aggravated character, implying a defect in character which unfitted him to continue as a muktear, and ordered his name to be struck off the rolls.

The petitioner presented an application to the High Court on the 26th July 1910, setting forth his previous conviction and disbarment, but omitted to disclose the facts of the enhancement of his sentence and the proceedings which culminated in an order directing his prosecution for swearing a false affidavit. These additional circumstances were brought to light by a report from the District Judge of Rajshaye, and were placed before the Court by the Government Pleader. The petitioner's application was supported by several certificates of character from Deputy Magistrates, vakils, local pleaders and other respectable gentlemen, Mahomedans and Hindus.

Moulvie Wahed Hussain, for the petitioner. The application of a legal practitioner dismissed for misconduct is maintainable. The Court which disbarred him is the proper Court to deal with the question of his re-instatement. He referred to *In re Abinash Chandra Moitra* (1), *In re Chanda Singh* (2).

- (1) (1909) I. L. R. 37 Calc. 173. (2) (1909) 14 C. W. N. 521;
11 C. L. J. 438.

The order of disbarment does not create a perpetual disability: *King v. Greenwood* (1). The High Court has power to re-admit a muktear struck off the roll under the Legal Practitioners Act in the exercise of its powers of general superintendence, though there is no express provision in the Act for re-instatement. He relied further on *In re Robins* (2), *In re Brandreth* (3), and *In re Poole* (4).

The *Senior Government Pleader* (*Babu Ram Charan Mitter*), for the Crown. I have ascertained that the petitioner has not made a full and true disclosure of all the facts affecting his character. The previous records of his case are in the office. [MOOKERJEE J. We shall look into the records.]

Cur. adv. vult.

MOOKERJEE AND SHARFUDDIN JJ. This is an application by one Abiruddin Ahmed, who was formerly a muktear and practised as such in the Criminal Courts at Rampore Boalia in the district of Rajshaye. On the 28th January 1903 he was dismissed by this Court, under section 12 of the Legal Practitioners Act of 1879, on the ground that he had been convicted of a criminal offence, namely, an offence under section 363 of the Indian Penal Code, implying a defect of character, which rendered him unfit to be a muktear. On the 26th July 1910 the present application was made with a view to the re-instatement of the petitioner, on the ground that since his dismissal he had borne an honourable character and had suffered considerable pecuniary loss. The application is supported by certificates as to the character of the petitioner and his present circumstances. These certificates are signed, amongst others, by the Junior Government Pleader of Rajshaye, members of the legal profession in that district, and other gentlemen occupying positions of responsibility. Notice of the application has been served upon the learned Government Pleader, who has been heard, and has placed before us facts which he has ascertained from the District

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(1) (1760) 1 W. Black. 222.

(2) (1865) 34 L. J. Q. B. 121.

(3) (1891) 60 L. J. Q. B. 501.

(4) (1869) L. R. 4 C. P. 350.

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Judge of Rajshaye as to the previous conduct and character of the petitioner. Two questions arise upon this application (of which we take cognizance under the special direction of the Hon'ble the Chief Justice), namely, *first*, whether it is competent to this Court, after a legal practitioner has been removed from the roll, to re-instate him where the atonement of a long period of good conduct is offered, and, *secondly*, if the Court has the power to make an order of this description, whether an order in favour of the petitioner ought to be made in the circumstances of the present case.

In so far as the first of these questions is concerned, there can, in our opinion, be no room for controversy that it is open to a Court, when a legal practitioner has been dismissed for misconduct of any description, in the widest sense of the term, to re-admit him after the lapse of time, if he satisfies the Court that he has in the interval conducted himself honourably, and that no objection remains as to his character or capacity. In one of the earliest cases on the point, *King v. Greenwood* (1), where an attorney about two years previously had been struck off the roll for malpractice, and was, upon petition, re-instated, the Court declared that the striking off the roll was not to be understood as a perpetual disability, but was sometimes only meant as a punishment, and might be considered in the light of a suspension only, if the Court saw good cause. Again, in an *Anonymous case* (2), a solicitor, who had been struck off the roll for misconduct, was restored after ten years, during which period he had, amidst great privation and suffering, maintained an irreproachable character; his application was supported by a memorial signed by a very large number of solicitors. Sir John Romilly, M.R., said that, though he was very properly struck off, yet, considering the great length of time that had elapsed and the great suffering that he had endured, and considering the testimonials to his good behaviour and conduct, and the absence of opposition from the Law Institute, he might be restored to the roll. In the course of argument in

(1) (1760) 1 W. Black. 222.

(2) (1853) 17 Beav. 475.

this case, counsel in support of the motion referred to the case of *In re Smith* (1), before Lord St. Leonards, in which Smith's name after having been struck off the roll for some irregularity in practice, as Master Extraordinary, was ordered to be restored, but with a proviso that he should be suspended from practising for six months. Another instance, in which a similar order was made, is to be found in the case of *In re Robins* (2). A very instructive case is that *In re Pyke* (3). Pyke was an Attorney. In 1836, after he had practised for about six years, his name was struck off the roll at his own request, in order that he might be called to the Bar. In 1838 he was called to the Bar: in 1843 he was disbarred by the Benchers on account of professional misconduct, namely, participation by previous agreement in the profits of an attorney. This decision was affirmed on appeal by fifteen Judges. In November 1845 Pyke applied to the Court to be restored to the roll of attorneys, but his application was refused: *In re Pyke* (4). In 1865 he applied again to be re-admitted as an attorney, but this application also was refused: *In re Pyke* (5). In the same year Pyke renewed his application, and was re-admitted: *In re Pyke* (5). Cockburn, C.J., after observing that the same honour and the same integrity which are essential to the character and position of a barrister are also necessary to the character and position of an attorney, and that dishonest or dishonourable conduct which unfitted a man to be at the Bar was sufficient to exclude him also from the other branch of the profession, held that, both on principle and precedents, sentences of exclusion from either branch of the profession need not necessarily be exclusion for ever. The test to be applied is, in the words of the learned Chief Justice, whether the sentence of exclusion, however right, has had the salutary effect of awakening in the delinquent a higher sense of honour and duty, and whether, in the interval, his conduct had been so

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(1) Unrep. cited in 17 Beav. 477. (4) (1865) 6 B. & S. 703;

(2) (1865) 34 L. J. Q. B. 121. 34 L. J. Q. B. 121.

(3) (1845) 1 New Pract. Cases 330. (5) (1865) 6 B. & S. 707;

34 L. J. Q. B. 220.

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irreproachable that, notwithstanding a delinquency in early life, he might be safely entrusted with the affairs of clients and admitted to an honourable profession without that profession suffering degradation. An application to strike off the rolls, or re-admit to them, ought not to be looked at with respect to the punishment of the individual himself. The Court has a duty to perform to the suitors and to the profession of the law, and is bound to see that the persons admitted to it are persons on whose integrity and honour reliance may be placed, persons whose conduct has been such as to inspire confidence in their character. A very similar view was taken in the case of *In re Brandeth* (1), in which it was ruled that the Court has power, even where it is proved that a conviction for an offence against the Criminal law has taken place, but the atonement of a long period of good conduct has been offered, to restore a solicitor to the roll. In 1879 the name of Brandeth was struck off the roll upon proof of a conviction for obtaining money by false pretences from clients. In 1883 an application was made by him to be restored to the practice of his profession. This was refused by Grove and Mathew JJ., and a similar application made in 1886 to Grove and Stephen JJ., met with the same fate. In 1891, however, Lord Coleridge C.J., with the concurrence of Mathew J., held that sufficient grounds had been made out to restore him to the roll. One of the grounds upon which the learned Chief Justice proceeded was that the petitioner, who had been for twelve years off the roll, produced a very strong body of evidence that during the whole of that time he had conducted himself irreproachably. He added that there should be no occasion on which it was absolutely, as a point or rule of law, impossible for a man to redeem his character, and that if a man had done his very best so to redeem his character, he might be entitled to the indulgent consideration of the Court. In the course of his judgment, the learned Chief Justice mentioned an unreported case of another solicitor, Barber, who was prosecuted for com-

(1) (1891) 60 L. J. Q. B. 501.

plicity in a fraud as to a will, convicted and sentenced to transportation in 1843; as a result, his name was removed from the roll, but he was subsequently re-admitted by the Court of Queen's Bench after three applications for re-instatement had been refused, twice by that Court in 1850 and 1851, and once by the Master of the Rolls in 1854: see this matter reported at one stage: *In re Barber* (1). Cases are also to be found in the Reports where an application for re-instatement has been entertained, but refused on the merits: *Ex-parte Frost* (2), where a solicitor had been convicted of seditious practices; *In re Hawdane* (3), where a solicitor had been twice convicted of conspiracy to extort money by means of libels; *In re Garbett* (4), where the solicitor, who had been convicted of forgery, *Reg. v. Garbett* (5), had received a pardon and was dismissed in 1849 on account of perjury in an affidavit of increase, concealed the fact of conviction for forgery in his application for re-instatement; and *In re Poole* (6) where an attorney who had been dismissed for misappropriation of moneys of a client, subsequently became bankrupt and applied for re-instatement without any offer of reparation. The case of *In re Lamb* (7), is clearly distinguishable, and shows merely that, when the dismissal has a permanent effect under statutory provisions, an order for re-instatement is not permissible.

The principle, deducible from the long series of English decisions we have just reviewed, has been adopted in the American Courts, and it is regarded there as indisputably settled that an order or judgment of disbarment is not necessarily final or conclusive for all time, but an attorney who has been disbarred may be re-instated, on motion or application, for reasons satisfactory to the Court. Thus in *Boston Bar Association v. Greenwood* (8), it is stated that the removal of an attorney from office may be absolute, leaving

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(1) (1854) 19 Beav. 378.

(5) (1847) 2 C. & K. 474;

(2) (1815) 1 Chitty 558 note.

1 Den. C. C. 226.

(3) (1841) 9 Dowl. Pr. Ca. 970.

(6) (1869) L. R. 4 C. P. 350.

(4) (1856) 18 C. B. 403.

(7) (1889) 23 Q. B. D. 477.

(8) (1897) 168 Mass. 169; 46 N. E. 568.

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the party to apply to the Court for re-admission if his offence is of such a kind that, after a lapse of time, he can satisfy the Court that he has become trustworthy, or the removal may be for a stated time if the Court is of opinion that the interests of the public will thereby be sufficiently protected. Again, in the case of *In re Palmer* (1), the test for re-instatement is thus formulated: looking at the life and conduct of the attorney prior to the disbarment, have his life and conduct since that time been such as to satisfy the Court that, if restored to the Bar, he will be upright, honourable, and honest in all dealings? Will his restoration to the Bar be compatible with a proper respect of the Court for itself and with the dignity of the profession? See also *In re Boone* (2), *In re Treadwell* (3), *In re King* (4), *In re Enright* (5), *In re Burris* (6), *In re Essington* (7), *In re Weed* (8), *In re Newton* (9), *In re Simpson* (10), *In re Sullivan* (11).

The view taken in the English Courts has also been adopted by the High Court of Australia in a recent decision *Incorporated Law Institute v. Meagher* (12), where the authorities and the principles which underlie them are elaborately discussed. In 1896 Meagher was struck off the roll of solicitors, as he had been party to a conspiracy to pervert the course of justice. In 1904 he applied to be re-admitted to practice. The Court refused the application, but intimated that the application would probably be granted if renewed after the 1st June 1906, provided evidence was given of continued good conduct. In 1906 the application was renewed, but refused, as his conduct in the interval had been unsatisfactory. In

(1) (1894) 9 Ohio C. C. 55, 70.

(2) (1898) 90 Fed. 793.

(3) (1896) 114 Cal. 24;
45 Pac. 993.(4) (1896) 54 Ohio 415;
43 N. E. 686.(5) (1897) 69 Ver. 317;
37 Atl. 1046.(6) (1905) 147 Cal. 370;
81 Pac. 1077.(7) (1904) 32 Colo. 168;
75 Pac. 394.(8) (1904) 30 Mont. 456;
77 Pac. 50.(9) (1902) 27 Mont. 182;
70 Pac. 510, 982.(10) (1903) 11 N. Dak. 525;
93 N. W. 918.(11) (1904) 185 Mass. 426;
70 N. E. 441.

(12) (1909) 9 Com. L. R. 655.

1909 he renewed his application again. The Supreme Court of New South Wales held that it was bound to re-admit the petitioner by reason of the promises made in 1904, unless it was proved that he had been meanwhile guilty of misconduct. Upon appeal by the Incorporated Law Institute, the order of re-admission was discharged. It was ruled by the High Court, *first*, that the order of re-admission, quite as much as an order of removal or suspension, was essentially judicial in its nature and liable to be challenged in appeal; *secondly*, that a Judge is not entitled to bind himself or his successor by a promise as to future action on problematical facts; *thirdly*, that the question was not one of fact, but of proper inference to be drawn from relevant facts clearly ascertained, namely, whether, in spite of previous misconduct which had already grievously tainted his reputation and led to the order of dismissal, he had affirmatively satisfied the Court that he was a fit and proper person to stand in the ranks of an honourable profession and in whom the public might repose undoubted confidence. Upon a review of the facts, the Court reversed the order of re-admission, as it was not satisfied that, if the petitioner was restored to the roll, he might not act in a similar manner when opportunity offered.

These cases amply establish the position that, in so far as the English and American Courts are concerned, though the name of a legal practitioner may have been removed from the rolls by reason of professional misconduct or criminal conviction, the Court may in its discretion re-admit him, if satisfied that during the interval which has elapsed since the order of removal was made, he has borne an unimpeachable character, and may with propriety be allowed to return to the practice of an honourable profession.

The doctrine just explained has been adopted in this Court as wellfounded on principle, and we have been able to trace instances in which similar orders have been made with respect to an attorney [*In re Pearson* (1), *In re Cockereil*

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Smith (1)], a vakil [*In re Rup Nath Banerjee* (2)], and a pleader, [*In re Kally Prosonna Chatterjee* (3), *In re Nobin Krishna Mookerjee* (4).] On the 18th June 1867 this Court, (Peacock C.J. and Norman and Phear JJ.) removed from the roll an attorney by name Pearson for gross professional misconduct. Sir Barnes Peacock quoted, with approval, the observation of Lord Mansfield in *Ex-parte Brounsall* (5), that the test to be applied was whether the conduct of the attorney was such as made it proper that he should continue a member of a profession which should be free from all suspicion. The other learned Judges concurred in the view that the misconduct was of such a grave character that Pearson should be struck off the roll of attorneys. On the 11th January 1870, Pearson applied to be re-admitted, and produced numerous certificates to show that since his removal he had conducted himself as a strictly honourable man. This application was refused on the 18th January 1870. On the 15th February 1871 Pearson made another application, upon which no action was taken, as Norman C.J., with the concurrence of Phear J., thought that the application was premature. On the 26th March 1872 Pearson renewed his application, and counsel on his behalf relied upon the cases of *In re Pyke* (6), *In re Poole* (7), and *In re Robins* (8). On the 16th April 1872 Sir Richard Couch C.J., with the concurrence of Jackson and Markby JJ., directed Pearson to be re-admitted to the roll of attorneys. Again, on the 22nd December 1875, Cockerell Alfred Smith was removed from the roll of attorneys by Garth C.J., and Phear and Pontifex JJ. for gross professional misconduct (misappropriation of the funds of a client); but subsequently he was re-admitted by Garth C.J., and Markby J., on the 25th February 1878, as he had, in the interval, done his utmost to make amends for his conduct, and produced a number of testimonials to show that he had honourably conducted him-

(1) (1878) Unrep.

(2) (1890) Unrep.

(3) (1885) Unrep.

(4) (1888) Unrep.

(5) (1778) 2. Cowp. 829.

(6) (1865) 6 B. & S. 703, 707;
 34 L. J. Q. B. 121, 220.

(7) (1869) L. R. 4 C. P. 350.

(8) (1865) 34 L. J. Q. B. 121.

self since his name was removed. On the 21st January 1878 a Full Bench of this Court (Sir Richard Garth C.J., Kemp, Jackson, Markby, Ainslie, Birch and Mitter JJ.) directed the name of Rup Nath Banerjee to be struck off the roll of vakils of this court, on the ground of grave professional misconduct, because he had proved himself unfit to be trusted with the conduct of business in the interest of clients, and had, when called upon to show cause, greatly aggravated his offence by the very dishonest manner in which he had dealt with the Court. Later on, on the 12th March 1890, another Full Bench of this Court (Sir Comer Petheram C.J., Norris, O'Kinealy, Macpherson, and Ghose JJ.) re-admitted him to the roll of vakils, on the ground that he had, in the interval, borne an irreproachable character, and that he had kept up his connection and acquaintance with the practice of the law. Similarly, one Kally Prosonna Chatterjee, a junior grade pleader, who practised in the Small Cause Court at Sealdah, was struck off the roll on the 14th August 1878 by Markby and Prinsep JJ. on account of grave professional misconduct (misappropriation of funds placed at his disposal by a client for the institution of a suit which he never filed). On the 6th April 1880 a petition submitted by him for restoration was rejected, on the ground that it was irregular, because it had not been presented by way of motion. On the 15th July 1881 an application made by him in that behalf was refused by Garth C.J., and Prinsep J. Some years later he renewed his application, and on the 8th January 1885 Prinsep and Pigot JJ. ordered him to be restored, on the ground that the time that had elapsed since the order of dismissal, and the certificate of his character in the interval, indicated that he had been sufficiently punished for his misconduct and had shown sufficient promise for future good behaviour. Finally, one Nobin Krishna Mookerjee, who practised as a second grade pleader and was convicted and sentenced to a term of rigorous imprisonment for an offence under the Registration Act [*Nobin Krishna Mookerjee v. Rassik Lall Laha* (1)] was removed

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from the roll of pleaders by order of a Division Bench of this Court (Pigot and O'Kinealy JJ.) on the 16th January 1885. Subsequently, on the 19th March 1888, by an order of the same two learned Judges, he was restored on the production of certificates of character. The recent decisions of *In re Abinash Chandra Moitra* (1) and *In re Chanda Singh* (2), which were given upon application for review of judgment, and are consequently not directly in point, also indicate the nature and extent of the disciplinary jurisdiction of the Court in this class of cases. In fact that a Court which has taken such action may reconsider the matter is clear from the direction given by the Judicial Committee in *Smith v. Justices of Sierra Leone* (3). These cases make it manifest that this Court has, in more than one instance, exercised the power it possesses to restore to the rolls a legal practitioner whose name had been struck off by reason of grave misconduct or conviction for a criminal offence. The only other question therefore, which arises for consideration is, whether in the circumstances of the present case, an order of this description ought to be made in favour of the applicant.

In so far as the facts of the case before us are concerned, they may be briefly narrated as set out in the application. The petitioner was, as we have stated, a muktear, and practised ordinarily in the Criminal Courts at Rampore Boalia in the district of Rajshaye. One Chandrabala brought a criminal case against the petitioner under section 363 of the Indian Penal Code for having kidnapped her daughter Nistarini. The case was tried by Mr. Rattray, the Deputy Magistrate of Rajshaye, who convicted the petitioner, and sentenced him to rigorous imprisonment for six months. Upon appeal the conviction was set aside and the case remanded to the District Magistrate for re-trial. The District Magistrate transferred the case for re-trial to Mr. Rattray, who again convicted the petitioner. Upon appeal against the second conviction, the Sessions Judge remanded the case for

(1) (1909) I. L. R. 37 Cole. 173. (3) (1848) 7 Moo. P. C. 174.

(2) (1910) 14 C. W. N. 521;

11 C. L. J. 438.

re-trial by the District Magistrate. The case was then transferred by order of the Court to the file of the Joint Magistrate, who convicted the petitioner, and sentenced him to rigorous imprisonment for one month. After recital of these facts the petitioner states that the District Judge subsequently made a reference under the Legal Practitioner Act to this Court, as a result of which the petitioner was dismissed under section 12. The petitioner adds that he has, during the seven years which have elapsed since the order of dismissal was made, employed himself as a law agent in the estates of several zemindars, that he has borne an irreproachable character, and that, as he has been placed in very embarrassed circumstances, he prays that his name may be restored to the roll of muktears. The application, as we have stated, is supported by several certificates. In answer to the petition the learned Government Pleader, who has rendered us valuable assistance in this matter, has placed before us a communication from the District Judge of Rajshaye, which, we regret to say, makes it manifest that the statements in the petition are imperfect and calculated to mislead the Court. The District Judge states that after the conviction of the petitioner, on the 1st April 1902, when he was sentenced to rigorous imprisonment for one month, two references were made by the Sessions Judge to this Court, one under section 438 of the Criminal Procedure Code for an enhancement of the sentence, and another under section 14 of the Legal Practitioners Act for the dismissal of the petitioner and the permanent cancellation of his license. On the first reference the sentence was enhanced to rigorous imprisonment for six months on the 18th June 1902, and on the second the petitioner was dismissed on the 28th January 1903. The learned District Judge further states that this Court, on the 9th June 1902, directed the petitioner to be prosecuted under section 193 of the Indian Penal Code, on the ground that he had sworn a false affidavit in support of a criminal motion filed against an order of the Court of the Sessions Judge of Rajshaye. The records of this last proceeding have been dis-

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covered after considerable search, and the facts, in so far as we are able to gather them, are as follows. It appears that one Hamidullah Mondal was also convicted by the Deputy Magistrate of Rampore Boalia, on the 6th September 1901, under section 363 of the Indian Penal Code, for having kidnapped from lawful guardianship the same girl Nistarini. In fact the incident was closely connected with that on account of which the petitioner himself was convicted. Hamidulla kidnapped her on the 24th December 1900; she was recovered, and Hamidulla was placed on his trial; Abiruddin acted as his muktear in these proceedings, and during their pendency managed to kidnap the girl with the assistance of a man named Hematulla, which led to the prosecution and conviction of himself and his co-adjutor. Hamidulla appealed to the Sessions Judge, who affirmed the conviction on the 28th November 1901. Hamidulla then applied to this Court to revise the order, on the ground that the Sessions Judge had refused to hear his pleader. This application was supported by an affidavit of the present petitioner, Abiruddin Ahmed, made on the 17th December 1901, to the effect that he was present in Court on the 28th November 1901, and that the statement that the Sessions Judge had delivered judgment refusing to hear the pleader for the appellant was true to his knowledge. A rule was granted by Prinsep and Stephen JJ., and came to be heard by Stevens and Harington JJ., who made it absolute on the 12th March 1902, on the ground that the allegation in the affidavit remained uncontradicted, as no cause was shown. What had occurred was that the District Magistrate, Mr. Roe, upon whom the Rule had been served, did not communicate the allegations contained in the affidavit to the Sessions Judge, Mr. Lee, who happened at the time to be absent on inspection of the subordinate courts. But subsequently the Sessions Judge, when he received the record sent back to him by order of this Court for re-trial of the appeal, learnt of this allegation, and at once reported to this Court that the statement was wholly untrue. But as the Rule had been made absolute, and the appeal directed to be

re-heard, the order could not be reviewed and rescinded; but the Court (Stevens and Harington JJ.), on the 16th April 1902, directed notice to issue upon the present petitioner to show cause why he should not be prosecuted for swearing a false affidavit, and also why he should not be dismissed under the Legal Practitioners Act. This Rule was served upon the petitioner, but, as he did not show cause, it was subsequently made absolute, and the petitioner was, on the 9th June 1902, directed to be prosecuted for perjury. But by reason of some inexplicable mistake in the office of the Government Solicitor, to whom the papers were forwarded for necessary action, the matter appears to have been overlooked, and the petitioner had the good fortune to escape the prosecution directed by this Court. Shortly afterwards, on the 18th June 1902, the sentences passed by the Joint Magistrate upon both Abiruddin and Hematulla were, upon a reference by the Sessions Judge, enhanced to rigorous imprisonment for six months each by Stevens and Harington JJ., and the petitioner was later on dismissed on the 28th January 1903 by Prinsep and Stephen JJ. It is not disputed that the order of dismissal was made with perfect propriety, and, indeed, the order cannot be successfully assailed, because, as Lord Westbury observed in *In re Wallace* (1), if an attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the roll. Upon the materials, therefore, so far as they are available to us, these facts are clear, namely, *first*, that the petitioner was convicted of an offence of a grave character under section 363 of the Indian Penal Code, which implied moral turpitude to such an extent that this Court felt it its duty to enhance the sentence passed on him by the Subordinate Court, and to remove him from the roll; *secondly*, that the petitioner made a false affidavit in support of an application for revision made to this Court by Hamidulla, who was finally convicted of an offence under section 363 of the Indian Penal Code in the course of a closely connected transaction; and, *thirdly*, that the petitioner has

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(1) (1866) L. R. 1 P. C. 283; 4 Moo. P. C. N. S. 140.

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not, in the application now presented to us, made a full disclosure of his previous history, but has deliberately omitted to mention the fact of enhancement of sentence, as also the proceedings which culminated in the order by which his prosecution was directed for perjury. These facts, indeed, would not have been discovered, but for the assistance given to us by the learned Government Pleader. Under these circumstances, after anxious consideration of the matter, we have arrived at the conclusion that it would not be right to re-admit the petitioner to the roll of muktears. If we were to make an order in his favour, he would be placed in a position of great trust and responsibility, which, we are of opinion, he should not occupy. To use the language of Mr. Justice Willes in *In re Poole* (1), "if we look at the power vested in practitioners and officers of this Court, persons who thus have the sanction of the Court for saying that *primâ facie* at least they are worthy to stand in the ranks of an honourable profession, to whose members ignorant people are frequently obliged to resort for assistance in the conduct and management of their affairs, and in whom they are in the habit of reposing unbounded confidence, if we look to the fact that in restoring the petitioner to the roll, we should be sanctioning the conclusion that he is, in our judgment, a fit and proper person to be so trusted, we feel that we ought not to do so, except upon some solid and substantial grounds." The learned vakil for the petitioner strongly urged upon us to deal leniently and mercifully with the applicant, as he has a family dependent upon him for support, and these will be the principal sufferers from the failure of this motion. As Jervis C.J. put it in *In re Garbett* (2), that undoubtedly is a circumstance which we cannot but regard with the deepest regret and commiseration. But at the same time it must be observed that a wife and family have always been considered as guarantees to society that a man will conduct himself with honour and integrity in his dealings with the world; and we must not lose sight of the fact that if we permitted ourselves to be influenced by

(1) (1869) L. R. 4 C. P. 350, 353. (2) (1856) 18 C. B. 403, 413.

consideration of that sort to extend mercy to the petitioner we should be running the risk of injury and injustice to the litigant public. Upon the whole, giving its due weight to all that has been urged on behalf of the petitioner, we must refuse this application.

E. H. M.

Application refused.

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PRIVY COUNCIL.

CHANDRA KISHORE ROY

v.

PRASANNA KUMARI DAS.

P.C.*
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Nov. 3;
Dec. 2.

[On appeal from the High Court at Fort William in Bengal.]

Will—Construction of Will—Clause for maintenance of daughters—Succession Act (X of 1865) ss. 111, 187—"Uncertain event"—Marriage of daughters—Legatee, right of, to sue—Succession Act s. 3—"Probate" of Will obtained only after institution of suit—Grant of Probate, modified by High Court on appeal.

A Hindu died in 1879, leaving a will, whereby (among other things) he made provision for his wives and his daughters who survived him. The clause providing for the daughters was: "When they will be married, and if they desire to live in separate houses, the person in whose management my property will be at the time will make separate houses for them in the vicinity of my house from the income of my property. For the maintenance of my daughters I fix an allowance of Rs. 600 a year for Srimati Prasanna, and Rs. 600 for Srimati Sarat. As long as the daughters will live in the separate houses in this place they will get the fixed allowances, respectively, but if the daughters do not live in this place, they will get Rs. 10." The daughters married in 1888 and 1889, respectively, and lived in separate houses. In suits for their allowances it was contended that the bequests to them were given in the "uncertain event" of their marriage, and as that event did not happen until after the death of the testator, the bequests were void by reason of s. 111 of the Succession Act (X of 1865) and never took effect.

Held, on the construction of the above clause, that the payment of maintenance was not contingent on the daughters' marriages, and that therefore s. 111 was not applicable.

* *Present*: LORD MACNAGHTEN, LORD MERSEY, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.

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At the time the suits were instituted no letters-of-administration had been granted, but pending the suits the widow obtained from the District Judge a grant of letters-of-administration with the will annexed. The grant was, on appeal, modified by the High Court by limiting it to the realisation of the maintenance allowance provided by the will for the widow; but before the letters-of-administration could be recalled and altered the widow died and the letters were never formally altered. It was contended that the suits could not be maintained with reference to s. 187 of the Succession Act which requires that before the right of a legatee can be established "probate of the will shall have been granted."

Held, that the grant of administration with the will annexed was, within the meaning of s. 3 of the Act, a grant of "probate" which was a compliance with the provisions of s. 187. The subsequent limitation of the grant was immaterial.

So long as the compliance with the section was prior to decree, the fact that it was after the institution of the suits made no difference and the Court was fully competent to deal with the suits.

TWO APPEALS consolidated from the judgment and decrees (29th May 1906) of the High Court at Calcutta affirming decrees (22nd April 1904) of the District Judge of Rangpur, which had affirmed decrees (23rd December 1903) of the Subordinate Judge of Rangpur.

The defendant was the appellant to His Majesty in Council.

The suits out of which the appeals arose were instituted respectively by Prasanna Kumari Dasi and Sarat Kumari Dasi, the daughters of one Kumar Shyam Kishore Roy, who died on 18th July 1879, having executed a will dated 16th Magh 1284 (28th January 1878), in which, after stating rules for the exercise of permission to adopt previously granted by registered deeds to his widows in 1875, the testator, by clause 6 of the will, made provision for maintenance allowance to be paid to his wives and to his daughters, "Rs. 15 each daughter as long as they remain joint in food with their mothers." And then in clause 9 he provided that—

"When the daughters will be married and if they desire to live in separate houses, the person in whose management my moveable and immoveable property will be at that time will make separate houses, for the daughters in the vicinity of my house from the income of my moveable and immoveable property. For the maintenance of my daughters I fix an allowance of Rs. 600 a year for Srimati Prasanna Kumari,

and Rs. 600 a year for Srimati Sarat Kumari. As long as the daughters will live in the separate houses in this place they will get the fixed allowances, respectively. But if the daughters do not live in this place they will get at the rate of Rs. 10."

The defendant in the suits was Kumar Chandra Kishore Roy, the appellant, who was, after the death of the testator, adopted by Rani Pran Kishori, the senior widow, in accordance with the provisions of the will. The defendant being a minor, the estate was managed for him by the Court of Wards.

The marriages of the two daughters took place in March 1888, and July 1889, respectively, and afterwards they each lived in a separate house, and each received, in accordance with the provisions of the will, an allowance of Rs. 50 a month from the Court of Wards.

The defendant received possession of the estate from the Court of Wards on 6th May 1896, since which date only a small portion of the allowance had been paid to the daughters who, in consequence of the non-payment, filed in 1900 plaints in the Subordinate Judge's Court, in which they set out the above facts and claimed the arrears of maintenance with interest.

The only original pleas in defence now material were (a) that the claims for maintenance under the will were not maintainable, because no probate or letters of administration with the will annexed had been granted; and (b) that on a true construction of the will the bequests of the allowances for maintenance were bad in law, because they were dependent on the happening of a specific uncertain event, namely, marriage, and that event had happened subsequent to the death of the testator. Whilst the suits were pending Rani Pran Kishori Dasi in October 1901 obtained from the District Judge of Rungpur a grant of letters of administration with the will annexed in respect of the entire estate of the testator; but on appeal by the defendant the High Court, on 24th February 1903, made an order to the effect that the letters of administration should be limited to the realisation of the maintenance allowance provided for her by the will. The

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District Judge thereupon called upon Pran Kishori Dasi to produce the letters of administration that had been granted, so that fresh letters with the limitation ordered by the High Court might be issued; but in the meantime she died, the result being that the letters already granted to her remained formally uncanceled.

The defendant thereafter raised the further contention in the suits, that as the effect of the order of the High Court dated 24th February 1903 was to cancel the letters of administration granted by the District Judge, and as no other letters had been, or could be, issued, the suits were not maintainable, having a regard to section 187 of the Indian Succession Act (X of 1865).

The Subordinate Judge made decrees in favour of the plaintiffs as prayed; and, on appeal, those decrees were upheld by the District Judge (except as to a small portion of the interest claimed).

Second appeals came before a Divisional Bench of the High Court (CHUNDER MADHUB GHOSE AND C. P. CASPERSZ JJ.), who held that section 187 of the Succession Act was no bar to the maintenance of the suits; and that, "upon reading the 9th paragraph of the will, as also the 6th paragraph thereof, which also bears upon the matter of the maintenance allowance to the daughters, the allowance provided by the first-mentioned paragraph is not contingent upon their marriage," and consequently that "section 111 of the Succession Act does not stand in the way of the plaintiffs getting the allowances they have sued for."

The High Court, therefore, dismissed the appeals with costs.

On these appeals,

Sir R. Finlay, K.C., and *E. U. Eddis*, for the appellant, contended that on the proper construction of clause 9 of the will the bequests for maintenance allowance payable to the daughters were contingent upon their respective marriages; and the marriages having taken place only after the death of the testator, such bequests became, under s. 111 of the

Succession Act (X of 1865), inoperative and could not be enforced. The marriage of a Hindu girl was an "uncertain event" as contemplated by that section. Reference was also made to section 118 of the Succession Act.

It was also contended that, as no probate of the will or letters of administration with the will annexed had been granted at the time of the institution of the suits, the claims to the maintenance under the will could not be maintained, and it was submitted that the grant of letters of administration by the District Judge after the institution of the suits had been, moreover, in effect cancelled by the order of the High Court on appeal limiting the grant to the realisation of the maintenance allowance given to the widow Pran Kishori; and there was consequently no actual "probate" of the will in existence within the meaning of section 187 of the Succession Act. Reference was made to section 3, 26, 119, 125, 130, 180 and 181 of the Act.

DeGruyther, K.C., and *G. Considine O'Gorman*, for the respondents, contended that the provisions of section 187 had been sufficiently complied with, inasmuch as the District Judge had in fact granted "probate" of the will as defined in section 3 of the Succession Act; and it was immaterial that it was granted only after the suits had been instituted. That grant was not cancelled by the High Court's order limiting the grant. Cancellation could only have been effected by the recall and alteration of the grant already issued, which was prevented by Pran Kishori's death. Reference was made to the Probate and Administration Act (V of 1881), section 184; The Hindu Wills Act (XXI of 1870), section 2, showing that section 187 of the Succession Act was applicable to Hindu wills; the Succession Act section 3; and *Gordhandas v. Bai Ramcoover* (1).

Section 111 of the Succession Act was not applicable, because on the true construction of clause 9 of the will the bequests to the daughters for maintenance were not contingent on their marriage. Those bequests were void and enforceable.

(1) (1901) I. L. R. 26 Bom. 267.

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Eddis, in reply, cited *Mohamidu Mohideen Hadjiar v. Pitchey* (2).

The judgment of their Lordships was delivered by LORD MERSEY. These are two appeals from the judgment and decrees of the High Court at Fort William in Bengal, dated the 26th May 1906, confirming a decree of the District Judge of Rungpur, dated the 22nd April 1904, which confirmed a decree of the Subordinate Judge of Rungpur, dated the 23rd December 1903. The suits were brought by two Hindu ladies, daughters of one Kumar Shyam Kishore Roy, deceased, against the appellant, who is the adopted son of the deceased, to recover arrears of maintenance alleged to be due to them under their father's will. The appellant denied that the respondents were entitled to any maintenance under the terms of the will, and further objected that they were not competent to maintain their suits, inasmuch as they had not obtained letters of administration to their father's estate.

The facts, so far as they relate to the first point, are as follows:—On the 18th July 1879 Kumar Shyam Kishore Roy died. He left no son, but he left two of his wives, namely, Rani Pran Kishori and Rani Basanta Kumari, surviving him. By the latter wife he had had two daughters, who are the present respondents. He had made a will dated the 28th January 1878. This will, together with certain deeds previously executed by the testator, granted permission to the wives to adopt sons, and in accordance with this permission the widow Rani Pran Kishori adopted the appellant. At this time the appellant was a minor. The will makes provision for the wives and for the two daughters. The clause in the will relating to the two daughters, omitting irrelevant words, is as follows:—

“When they will be married and if they desire to live in separate houses, the person in whose management my property will be at the time will make separate houses for them in the vicinity of my house from the income of my property. For the maintenance of my daughters I fix an allowance of Rs. 600 a year for Srimati Prasanna and Rs. 600

for Srimati Surat. As long as the daughters will live in the separate houses in this place they will get the fixed allowances respectively; but if the daughters do not live in this place, they will get Rs. 10."

The two daughters married—the one in 1888 and the other in 1889—and they went to live in separate houses. The estate was at this time under the management of the Court of Wards, the appellant being still a minor. The Court, after the respective marriages, paid to each of the ladies the Rs. 600 per annum as provided by the will. The appellant came of age in 1896, and then entered into possession of the estate. Since obtaining possession he has refused to make the allowance to the ladies, alleging that the clause in the will providing for the allowance is void by reason of the provisions contained in section 111 of the Indian Succession Act (Act X of 1865). Hence these two suits. Section 111 of the Succession Act is as follows:—

"Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable."

It is contended on behalf of the appellant that the bequests to the daughters were given only in the uncertain event of marriage, and that as that event did not happen in the lifetime of the testator, the bequests never took effect. Their Lordships are of opinion that this contention is not well founded.

The payment of the maintenance is not made contingent on the marriage of the ladies. The will deals with the maintenance in a clause which stands by itself and which must be read by itself. The clause contains no reference to marriage or to any other future event. Section 111 therefore has no bearing on the construction to be put on the bequest.

The facts relating to the second point are as follows. At the time when these suits were instituted (September 1900) no letters of administration had been granted; but while the suits were pending, namely, on the 7th October 1901, the widow Rani Pran Kishori obtained from the District Judge of Rungpur a grant of letters of administration with the will an-

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nexed. This grant was subsequently modified by a judgment of the High Court, dated the 24th February 1903, by limiting it to the realisation of the maintenance allowance provided for the widow by the will. Before the District Judge could recall and alter the said letters so as to bring them into conformity with the judgment of the High Court the widow died. Thus the said letters never were formally altered. Upon these facts the appellant contended that, having regard to section 187 of the Indian Succession Act, the Court was not competent to grant the relief prayed for. Section 187 is as follows :—

“No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the Province shall have granted probate of the will under which the right is claimed, or shall have granted letters of administration under the 180th section.”

The 180th section here referred to relates exclusively to wills proved elsewhere than within the province and provides for grants of letters of administration upon the production of authenticated copies of such wills; the section has no relevancy to the case now under consideration, for here the letters of administration were granted within the province. The question therefore turns entirely on the effect of the first part of section 187, which requires that before the right of a legatee can be established, probate of the will shall have been granted by a court of competent jurisdiction within the Province. By clause 3 of the Act “probate” is defined as meaning “the copy of a will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator.” Their Lordships are of opinion that “probate” as here defined was in fact obtained. The will was proved before a court of competent jurisdiction within the Province, and that court duly issued to the widow a certified copy of the will under the seal of the court, with a grant of administration to the estate of the testator. The provisions of the section were therefore strictly complied with. The subsequent limitation of the grant to so much of the estate of the deceased as might be sufficient to satisfy the widow’s claim, even if right appears to their Lordships to be immaterial. It is then said that even

if the provisions of section 187 were complied with, the compliance was after suit commenced, and was therefore too late. Their Lordships, however, are of opinion that, as the compliance was before decree, the Court was fully competent to deal with the case. Their Lordships will humbly advise His Majesty that the appeal should be dismissed and with costs.

J. V. W.

*Appeal dismissed.*Solicitors for the appellant: *Downer & Johnson.*Solicitors for the respondents: *T. L. Wilson & Co.*

PRIVY COUNCIL.

NITYAMONI DASI

v.

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March 10.

Ex parte NITYAMONI DASI.

[On petition relating to an appeal from the High Court at Fort William in Bengal.]

Privy Council, Practice of—Stay of execution of decree pending appeal—Power of High Court where appeal has been admitted by special leave—Civil Procedure Codes (Act V of 1908), o. XLV, r. 13; (Act XIV of 1882), s. 608.

The High Court has power, under rule 13 of order XLV of the Civil Procedure Code (Act V of 1908), to stay execution of a decree, pending an appeal to His Majesty in Council, in a case where the appeal has been admitted by special leave.

THIS was a petition for stay of execution of decree pending the hearing and determination of the above appeal, in which the respondents Madhu Sudan Sen and others (plaintiffs), had obtained a decree (11th December 1908) of the High Court at Calcutta, which affirmed with some modifications a decree (29th December 1906) of the Subordinate Judge of the 24-Parganahs.

**Present:* LORD MACNAGHTEN, LORD ROBSON, AND SIR ARTHUR WILSON.

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The petitioners, Nityamoni Dasi and others (defendants), stated in their petition that they obtained, on 19th July 1910, special leave to appeal to His Majesty in Council from the decree of the High Court which awarded to the plaintiffs-respondents possession, amongst other properties, of a one-seventh share in property known as No. 116, Cotton Street, Calcutta, with mesne profits, which had been afterwards assessed at Rs. 3,723-0-11; that the decree-holders partially executed the decree for mesne profits, and also so far as the decree allowed them possession of some of the properties in suit, and on 25th February 1910 they took out execution in respect of the balance of mesne profits due under the decree, amounting to Rs. 2,727-1-5, against the persons of four of the petitioners who were thereupon called upon to show cause why the decree should not be so executed; that by an order of the High Court, dated 28th January 1910, in a suit in which the respondent Gouranga Sen was the plaintiff, and the rest of the parties in the suit under appeal were defendants, a Receiver was appointed in respect of the property 116, Cotton Street, with effect from 17th February 1910, and the Receiver was now in possession of the property; that the petitioners applied to the High Court to direct that, pending the determination by His Majesty in Council of the above appeal, execution of the decree should be stayed on such terms as to security as to the High Court might seem fit; and that on 12th December 1910 the High Court refused such application for the following reasons.

After observing that by way of answer to the application it had been said that the High Court had no power to grant any stay of execution in an appeal to the King in Council, except under the terms of rule 13, order XLV, of the Code of Civil Procedure (Act V of 1908), and referring to three decisions of the High Courts in India bearing on the matter, the High Court observed as follows:—

“We are bound by the decision in *Tegha Singh v. Bichitra Singh* (1). At the same time I would point out that the

decision in that case, though alluding to certain changes of language in the new Code of 1908, omitted to notice the change which was intended to amplify the powers of the Court pending an appeal.

“In section 608 of the Code of 1882 the powers, pending an appeal, were vested in the ‘Court admitting the appeal,’ so that when the appeal had been admitted by special leave from the Judicial Committee this Court should not be regarded as coming within that description. In order XLV, rule 13, the words ‘admitting the appeal’ have been omitted, and, as is well known, designedly omitted, for the purpose I have indicated.

“The inconvenience of this limitation of the High Court’s jurisdiction was felt by their Lordships of the Judicial Committee in the case of *Mohes Chandra Dhal v. Satrugan Dhal* (1), and the inconvenience becomes abundantly apparent in this particular application. However, as I have said, we are bound by the decision and cannot refuse to follow it.

“The applicants before us have indicated that, if by reason of the previous decision we are unable to grant this application, a similar application will be made to the Privy Council, who will thus have an opportunity of expressing an opinion as to whether or not the High Court has the power indicated in rule 13 pending an appeal admitted by the Judicial Committee, and not by this Court. I may point out that in all other respects the provisions now reproduced in order XLV have always been applied without question to an appeal admitted by special leave.

“The respondents in this case, in view of the applicants’ expression of their determination to apply to the Privy Council, have given an undertaking not to proceed with personal execution for three months from this date.”

The petitioners therefore prayed for an order that the execution of the decree now under appeal should be stayed until the determination of the said appeal upon terms to be stated

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by their Lordships of the Judicial Committee or by the High Court.

Ross, for the petitioner, submitted that it was clear from the observations of the High Court that that Court considered it had jurisdiction to deal with the application under the provisions of the new Code of Civil Procedure (Act V of 1908), but appeared to think itself bound by the case referred to, and required the directions of their Lordships of the Judicial Committee before entertaining the application.

The judgment of their Lordships was delivered by
March 10. LORD MACNAGHTEN. Their Lordships are of opinion that the High Court has power to stay execution, notwithstanding that the appeal, as in this case, has been admitted by special leave of His Majesty in Council. Their Lordships venture to add that the learned Judges of the High Court are in a much better position than the members of this Board to determine in any particular case whether execution ought to be stayed, and if so, upon what terms and conditions and to what extent stay of execution ought to be granted.

Their Lordships will humbly advise His Majesty that execution in this case ought to be stayed upon such terms as the High Court may direct.

Solicitors for the petitioner: *T. L. Wilson & Co.*
J. V. W.

APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,
and Mr. Justice Coxe.

ASIMADDI SHEIKH

v.

SUNDARI BIBI.*

1911

May 1.

Appeal—Second Appeal, if it lies from an order passed under o. XXI, rr. 89 and 92 of the Code of Civil Procedure, 1908—Civil Procedure Code (Act V of 1908) ss. 2, 49, 104 (2) ; o. XXI, rr. 89-92 ; o. XLIII, r. 1 (j)—Civil Procedure Code (Act XIV of 1882), ss. 310A, 312, and 588.

No second appeal lies from an order passed in first appeal from an order under rule 89 or 92 of order XXI of the Code of Civil Procedure, 1908.

Section 104, sub-section (2) of the Code of 1908 takes away the right of second appeal where a second appeal could lie in cases under section 310A read with section 244 of the Code of 1882.

SECOND APPEAL by the judgment-debtor.

This appeal arose out of an application by the judgment debtor to set aside a mortgage sale upon deposit of the decretal amount and the purchaser's compensation. The sale sought to be set aside was held under the provisions of the Transfer of Property Act. The Court of first instance held that the applicant, though the judgment-debtor, had no *locus standi* to apply for setting aside the sale, as it was a mortgage-sale. It further held that if the mortgagor were allowed to have the sale set aside under rule 89 of order XXI of Act V of 1908, the provisions of s. 89 of the Transfer of Property Act would be nullified. On appeal, the Subordinate Judge upheld the decision of the lower Court and dismissed the appeal. Hence this second appeal.

Babu Mohincemohan Chakrabarti, for the respondent, took a preliminary objection to the hearing of the appeal: No

* Appeal from Order No. 583 of 1909, against the order of Radha Nath Sen, Subordinate Judge of Jessore, dated Sept. 27, 1909, confirming the order of P. N. Bhattacharjee, Munsif of Jhenidah, dated March 1, 1909.

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appeal lies from any order passed in appeal from an order passed under rule 92 of order XXI of the new Code of Civil Procedure. A first appeal lies under the new Code against an order passed under rule 92 of order XXI: see order XLIII, rule 1 (i). The Code provides for no second appeal. In the case of *Amir Rai v. Basdeo Singh* (1), the facts of which are very similar to this case, where the contention was practically between the judgment-debtor and the auction-purchaser, as here, it was held that no second appeal lay.

Babu Harachandra Chakrabarti, in reply, cited several cases decided under the provisions of the old Code of 1882.

JENKINS C.J. This case comes before us by way of appeal from an appellate order, and a preliminary objection has been taken that no appeal lies. The application which has resulted in this appeal arises out of rule 89 of order XXI of the Civil Procedure Code of 1908. The application under rule 89 was disallowed, and the Court, as required by rule 92, made an order confirming the sale. Thereupon, the sale became absolute. From such an order an appeal lies under order XLIII, rule 1, clause (j), which provides that an appeal shall lie from an order under rule 92 of order XXI setting aside or refusing to set aside a sale. Section 104, sub-section (2) provides that no appeal shall lie from any order passed in appeal under this section, and among the orders that came within the operation of that sub-section is an order made under rules from which an appeal is expressly allowed by rules. An endeavour has been made to escape from this clear provision of the law by the help of decisions under the Code of 1882 in relation to section 310A. But they are of no assistance. To begin with section 310A (which corresponds with rule 89 of order XXI) did not come within the operation of section 312, whereas rule 89 comes within the operation of rule 92, and so the basis on which the decisions of the Court under the old Code proceeded no longer exists. The decisions as to the appealability of

(1) (1906) 5 C. L. J. 204.

orders under section 310A rested on the view that orders under that section were in the majority of cases orders determining a question mentioned or referred to in section 244, and therefore were decrees, from which there would be an appeal and second appeal in appropriate conditions. But this view was dependent on the circumstance that an order under section 310A was not specified in section 588 as an order from which an appeal would lie as an appeal from order. This has been changed under the Code of 1908, for though it is provided by section 2 (2) that a decree shall be deemed to include the determination of any question within section 47 (corresponding with section 244 of the Code of 1882) the definition goes on to provide that it shall not include any adjudication for which an appeal lies as an appeal from an order. But an appeal does now lie as an appeal from order from an order made on an application under rule 89 of order XXI.

In this view, it is unnecessary to consider the further ground urged against this appeal, for I hold, for the reasons I have stated, that the preliminary objection taken on behalf of the respondents must prevail, and that this appeal must be dismissed with costs.

Coxe J. concurred.

S. M.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Sharfuddin.

1910

Nov. 22.

HOSSAINARA BEGAM

v.

RAHIMANNESSA BEGAM.*

Mortgage—Co-mortgagees—Appointment of a mortgagee as administrator to mortgagor's estate—Extinguishment of debt—Parties—Suit by co-mortgagee's administrator against mortgagor's heirs instead of mortgagor's administrator—Improper frame of suit—Limitation—Pro forma Defendant, transfer of—Limitation Act (XV of 1877) s. 22—Mortgagee administrator's right to interest.

A. S., the father of the two defendants, executed a mortgage bond in favour of A. J. repayable on the 16th October 1894. Subsequently A. S. executed a second mortgage in favour of A. A. and A. N. repayable on the 14th March 1896. A. J. transferred his security to A. A. and A. N. In 1896 A. S. died leaving an infant daughter and infant son, the present defendants, as heirs. In 1897 A. N. took out letters of administration to the estate of A. S., and was still acting as administrator when the present suit was instituted. In 1897 A. A. died and A. N. took out a succession certificate to collect the debts due to his estate. In 1902 the plaintiff took out letters of administration to the estate of A. A. On the 22nd October 1906, shortly before the expiry of 12 years from the date on which the first security was repayable, the plaintiff as administratrix brought the present suit for the recovery of Rs. 1,524 on both securities against the defendants, and joined A. N. as a *pro forma* defendant. A. N. showed that he was always ready to join the plaintiff, and on the 20th December 1906 his name was transferred from the category of defendant to that of plaintiff.

Held, that the appointment of one of the mortgagees as administrator to the estate of the mortgagor did not extinguish the right of action of the mortgagee other than the one who was appointed administrator and had sufficient assets to satisfy his own share of the debt. The mortgagee administrator could not, however, maintain an action.

Wankford v. Wankford (1), *In re Carew* (2), *Harihar Pershad v. Bholi Pershad* (3), *Matson v. Dennis* (4), *Vickers v. Cowell* (5), *Smith v.*

* Appeal from Appellate Decree, No. 1344 of 1908, against the decree of F. Roe, District Judge of 24-Pergannahs, dated May 19, 1908, affirming the decree of Pankaja Kumar Chatterjee, Munsif of Alipur, dated Oct. 3, 1907.

- (1) (1698) 1 Salkeld 299, 304. (3) (1907) 6 C. L. J. 383, 394.
(2) (1854) 4 Ir. Ch. Rep. 112. (4) (1864) 4 De G. J. & S. 345.

- (5) (1839) 1 Beav. 529.

Sibthorpe (1), *Powell v. Brodhurst* (2), *Steeds v. Steeds* (3), *Morley v. Bird* (4), *Sitaram v. Shridhar* (5), *Tamman Singh v. Lachhmin Kunwari* (6) followed.

Binns v. Nichols (7), *Dexter v. Arnold* (8), *Lowe v. Peskett* (9), *Barber Maran v. Ramana Goundan* (10) distinguished.

Richards v. Molony (11), and *Wallace v. Kelsall* (12) dissented from.

Held, also, that the appointment of A. N. as administrator vested in him the estate of A. S. under s. 4 of the Probate and Administration Act, 1881, and the suit should therefore have been brought against him and not against the heirs.

Clegg v. Rowland (13), *Beresford v. Ramasubba* (14), *Francis v. Harrison* (15), *Morley v. Morley* (16) distinguished.

Jaggewar Dutt v. Bhuvan Mohan Mittra (17) referred to.

The transfer of a party from *pro forma* defendant to plaintiff is not an addition of a new party within the meaning of s. 22 of the Limitation Act.

Nagendrabala Debya v. Tarapada Acharjee (18), *Khadir Moideen v. Rama Naik* (19) followed.

Abdul Rahaman v. Amir Ali (20) distinguished.

Pyari Mohun Bose v. Kedarnath Roy (21) referred to.

No interest should be allowed to a mortgagee administrator from the date when sufficient assets became available to him for repayment of the mortgage money.

Robinson v. Cumming (22), *Page v. Lloyd* (23) and *Adams v. Gale* (24) referred to.

SECOND APPEAL by Hossainara Begam and Mahomed Akbar Shiko, the defendants.

On the 9th June 1894, one Akbar Shiko, the father of the two defendants, executed a mortgage bond in favour of one Amir Jan as security for the repayment of an advance of Rs. 200, bearing interest at 24 per cent. per annum and repayable

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| (1) (1887) 34 Ch. D. 732. | (13) (1866) L. R. 3 Eq. 368, 373. |
| (2) [1901] 2 Ch. 160. | (14) (1889) I. L. R. 13 Mad. 197. |
| (3) (1889) 22 Q. B. D. 537. | (15) (1889) 43 Ch. D. 183. |
| (4) (1798) 3 Ves. 629, 631. | (16) (1858) 25 Beav. 253. |
| (5) (1903) I. L. R. 27 Bom. 292. | (17) (1906) I. L. R. 33 Calc. 425. |
| (6) (1904) I. L. R. 26 All. 318. | (18) (1908) 8 C. L. J. 286. |
| (7) (1866) L. R. 2 Eq. 256. | (19) (1892) I. L. R. 17 Mad. 12. |
| (8) (1823) 3 Mason 284. | (20) (1907) I. L. R. 34 Calc. 612. |
| (9) (1855) 16 C. B. 500. | (21) (1899) I. L. R. 26 Calc. 409. |
| (10) (1897) I. L. R. 20 Mad. 461. | (22) (1742) 2 Atk. 409, 411. |
| (11) (1856) 2 Ir. Ch. Rep. 1. | (23) (1831) 5 Peters 304. |
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on the 16th October 1894. On the 24th September 1894 Akbar Shiko executed a second mortgage in favour of two brothers, Ali Ashgar and Ali Naki, as security for a similar advance repayable on the 14th March 1896. On the 17th February 1896 Amir Jan transferred his security to Ali Ashgar and Ali Naki, who thus became the holders of both the securities. On the 3rd July 1896 the mortgagor Akbar Shiko died, leaving as his heirs an infant son and infant daughter, the present defendants. Ali Naki, who was also related to the mortgagor, was appointed guardian of their person and property, and in 1897 Ali Naki also took out letters of administration to the estate of Ali Shiko. On the 2nd March 1906 Ali Naki was discharged from the guardianship, but was still acting as administrator when the present suit was instituted. On the 11th October 1897, the other mortgagee Ali Ashgar died and Ali Naki took out a succession certificate to collect the debts due to his estate. In 1902 the plaintiff, who was the daughter of the deceased mortgagee Ali Ashgar, took out letters of administration to his estate. On the 22nd October 1906, shortly before the expiry of 12 years from the date on which the money due on the first security was repayable, the plaintiff as administratrix brought the present action for the recovery of Rs. 1,524 due for principal and interest on both securities against the defendants and joined the co-mortgagee Ali Naki as a *pro formâ* defendant. Ali Naki showed that he was always ready to join the plaintiff and on the 20th December 1906, after the expiry of 12 years his name was transferred from the category of *pro formâ* defendant to that of plaintiff, and the suit proceeded against the infant son and infant daughter of the mortgagor, they being represented by their certificated guardian. The Court of first instance made the usual decree for sale against the defendants, and upon appeal the District Judge affirmed the decree.

The defendants thereupon appealed to the High Court on four grounds:

First, that the appointment of one of the mortgagees as administrator to the estate of the mortgagor had the effect

of extinguishing the entire mortgage debt; *secondly*, that the suit, so far as the mortgagee other than the administrator was concerned, should have been brought against the administrator in whom the mortgagor's estate was vested and not against the mortgagee's heirs; *thirdly*, that the claim so far as it related to the security of the 9th June 1894 was barred by limitation inasmuch as the plaint should be deemed to have been presented on the date when the *pro formâ* defendant became a plaintiff; and, *fourthly*, that the plaintiffs were not entitled to claim any interest after the date when one of the mortgagees was appointed administrator to the mortgagor's estate and had sufficient funds to satisfy the mortgage debt.

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Babu Atul Krishna Roy, for the appellants.

Babu Ram Chandra Majumdar and *Babu Chandra Sekhar Banerjee*, for the respondents.

MOOKERJEE AND SHARFUDDIN JJ. This is an appeal on behalf of the defendants in a suit to enforce two mortgage securities. There is no controversy as to the circumstances under which the plaintiffs seek to recover the disputed amount, and they may be briefly narrated. On the 9th June 1894, Akbar Shiko, the father of the two defendants, executed a mortgage bond in favour of one Amir Jan. The principal sum advanced was Rs. 200 and carried interest at the rate of 24 per cent. per annum. The loan was repayable on the 16th October 1894. On the 24th September 1894, the mortgagor executed a second mortgage in favour of Ali Ashgar and Ali Naki as security for a loan of Rs. 200 which carried interest at the same rate, and was made repayable on the 14th March 1896. On the 17th February 1896, Amir Jan, the first mortgagee, transferred his security to the second mortgagees Ali Ashgar and Ali Naki. The result was that the second mortgagees thus became the holders of both the first and second securities. On the 3rd July 1896, the mortgagor, Akbar Shiko, died leaving, as his heirs, an infant daughter and an infant son who are the defendants in the present litigation. Immediately after this, Ali Naki, one of the mortgagees who

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was apparently related to the mortgagor, was, upon his own application, appointed guardian of the person and property of the infant son and daughter of the mortgagor. In 1897, Ali Naki also took out letters of administration to the estate of the mortgagor. The materials on the record indicate that at the time of the institution of the present suit he had not ceased to act as administrator, though on the 2nd March 1906, he was discharged from his office of guardian of the person and property of the infants. On the 11th October 1897, the other mortgagee, Ali Ashgar, died. Ali Naki, who was related to him, took out a succession certificate to collect the debts due to his estate, but in 1902 the plaintiff took out letters of administration. On the 22nd October 1906, that is a few days before the expiry of twelve years from the date on which the mortgage money due under the first security was repayable, the plaintiff as administratrix to the estate of Ali Ashgar commenced the present action for recovery of Rs. 1,524 upon both the securities. She joined as defendants the son and daughter of the mortgagor Akbar Shiko. She also joined as a *pro formâ* defendant the co-mortgagee Ali Naki, upon the allegation that he had refused to join as a plaintiff. The mortgagee thus made a *pro formâ* defendant, pleaded that he had always been ready to join the plaintiff, whereupon, on the 20th December 1906, his name was transferred from the category of *pro formâ* defendant to that of plaintiff. The claim was resisted by the son and daughter of the mortgagor, substantially on four grounds; namely, *first*, that the claim was barred by limitation; *secondly*, that the suit was not properly framed as it ought to have been instituted against the administrator Ali Naki; *thirdly*, that the mortgage debts had been extinguished inasmuch as administration to the estate of the mortgagor had been granted in favour of one of the two mortgagees, who as administrator received ample funds for repayment of the debt; and, *fourthly*, that even if the principal sums were shown to be recoverable, the claim for interest could not be sustained. The original Court overruled all these contentions and made the usual decree for sale against the

defendant. Upon appeal, the learned District Judge has affirmed this decision. The defendants have now appealed to this Court, and on their behalf the decision of the District Judge has been assailed on four grounds: namely, *first*, that the effect of the grant of letters of administration to one of the mortgagees was to extinguish the entire mortgage debt; *secondly*, that the claim could not be sustained against the heirs of the mortgagor, so long at any rate, as the administration continued in force; *thirdly*, that the claim is, in part at least, barred by limitation, because if the plaint is deemed to have been presented on the day when Ali Naki was transferred from the category of defendant to that of plaintiff, the suit was clearly instituted after the lapse of twelve years from the due date on the first mortgage; and, *fourthly*, that even if all these objections fail, the plaintiffs are not entitled to claim any interest on the mortgage securities after the date of the appointment of Ali Naki as administrator to the estate of their father and as guardian of their own persons and properties.

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In support of the first ground taken on behalf of the appellants, it has been argued that if a creditor takes out letters of administration to the estate of his debtor, although this alone may not operate as an extinguishment of the debt, if the debtor has assets which the creditor may retain to pay himself, it is extinguishment, for possession of assets amounts to payment. This contention has been sought to be supported by reference to a passage from Williams on Executors, 10th edition, Vol. I, page 1058, and to the decision in *Wankford v. Wankford* (1). This position need not be controverted, and may be maintained on the principle that there is an extinguishment of the debt if the person who is to receive the money is also the person who ought to pay. To put the matter in another way, if there are no assets, the administrator is not the person who ought to pay, though he is the person that is to receive the debt which is thus not extinguished except upon the supposition that the administrator has assets

(1) (1698) 1 Salkeld 299, 305.

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which he may retain to pay himself. The doctrine would be applicable to this case, notwithstanding the decision in *Binns v. Nichols* (1) and *Dexter v. Arnold* (2), because, in so far as the estate vested in an administrator in this country is concerned, there is not, in this respect, a distinction between real estate and personal estate. The question, however, which requires consideration here is, whether this doctrine is applicable when the person who takes out administration is one of two joint creditors. The learned Vakil for the defendants-appellants has invited us to give an affirmative answer upon the authority of the decisions in *Lowe v. Peskett* (3) and *Richards v. Molony* (4). The first of these cases is clearly distinguishable, and is an authority for the proposition that the doctrine of extinguishment of a debt by reason of the appointment of a creditor as the administrator to the estate of his debtor, has no application unless the administrator has in his hands legal assets presently available; the existence of equitable assets, not presently available, does not operate as a release or extinguishment of the debt. No doubt, in that case, whereas two persons were appointed executors, the debt was payable to one of them only; but the decision was founded on the ground that the assets of the testator which came into the hands of the creditor executor were not legal assets presently available, and the rule could not be applied that "if the testator makes his creditor his executor the action shall be released, but the debt remains for which he may retain." The second case, however, *Richards v. Molony* (4), upon which the learned Vakil for the appellant relies, does appear to support his contention. In that case it was ruled by Lord Chancellor Brady that the principle, that where the obligee in a bond becomes executor of the obligor and receives assets adequate to discharge the debt, it is extinguished, is applicable where one only of two obligees is appointed one of several executors of the obligor; it was further ruled that this principle prevails in law as well as in equity and is applicable albiet the obligees

(1) (1866) L. R. 2 Eq. 256.

(2) (1823) 3 Mason 284.

(3) (1855) 16 C. B. 500.

(4) (1850) 2 Ir. Ch. Pep. 1.

are trustees. It is to be observed, however, that although this case is mentioned as an authority in Williams on Executors (vol. I, page 1059), it has been subsequently overruled by the Judicial Committee of the Privy Council in Ireland in the case of *In re Carew* (1). There an obligor in a bond, with notice of the trust, appointed one of the two obligees who were trustees, as executors, and devised his real estate to him subject to his debts. The executor received personal assets sufficient to pay the bond debt, but wasted them. It was ruled that the debt was not extinguished and might be enforced against the real estate. Blackburn J., who delivered the opinion of the Judicial Committee, held with the concurrence of Lord Chancellor Brady, Mohanan C. J., Keatinge J., and Napier J., that the case of *Richards v. Molony* (2) had been erroneously decided. This conclusion was founded on the ground that as payment to one of the creditors trustees could not operate to release the debtor, there could not be constructive satisfaction of the rights of those beneficially entitled to the money, merely because one of the trustees had been appointed executor of the debtor. In our opinion, this view is manifestly well founded on principle. The learned vakil for the appellants has, however, contended upon the authority of the decision of the Madras High Court in *Barber Maran v. Ramana Goundan* (3) that where there are several persons who on the face of the instrument of mortgage are joint creditors, payment to one of them is a good discharge as against all (Jones on Mortgages, sec. 135, 958). This proposition, in our opinion, is too broadly formulated. As was pointed out by this Court in the case of *Harihar Pershad v. Bholi Pershad* (4), when a claim is on a money bond to two or more obligees, the presumption at equity is that the obligees are tenants in common, and not joint tenants of the debt, with the consequence that the discharge by one obligee cannot be set up as a defence as against the other obligee suing for his share of the debt. The principle applicable to the case before

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(1). (1854) 4 Ir. Ch. Rep. 112.

(2). (1850) 2 Ir. Ch. Rep. 1.

(3). (1897) I. L. R. 20 Mad. 461.

(4). (1907) 6 C. L. J. 383, 394.

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us appears to be that payment to one of two joint-mortgagees does not necessarily operate as a discharge of the debt in so far as the other mortgagee is concerned. Equity presumes that several persons together making an advance upon the security of a mortgage have separate interests in the money, and accordingly withholds relief from the mortgagor when in disregard of the terms of the proviso for redemption, he has made a payment to one mortgagee and not to both: *Matson v. Dennis* (1), *Vickers v. Cowell* (2), *Smith v. Sibthorpe* (3), *Powell v. Brodhurst* (4), which must be taken to have considerably shaken the authority of *Wallace v. Kelsall* (5). In the case before us, we must apply the doctrine stated by Wills J. in *Steeds v. Steeds* (6), citing from Lord Alvanley M. R. in *Morley v. Bird* (7), that although the mortgagees take a joint security, each means to lend his own money and to take back his own. There is nothing to indicate that the intention of the parties was that each of the persons in whose favour the mortgage obligation was created, was a creditor for the whole. Consequently, it cannot be presumed that the payment to one would liberate the debtor against all the creditors: on the other hand the presumption is that each was a creditor for his own share and could not give a discharge for the whole obligation: *Sitaram v. Shridhar* (8), and *Tamman Singh v. Lachhmin Kunicari* (9). On principle as well as on authority, therefore, we must hold that in the case before us the appointment of one of the mortgagees as administrator to estate of the mortgagor did not extinguish the right of action of the mortgagee other than the one who was so appointed administrator and had assets in his hands sufficient to satisfy his share of the mortgage debt. The first point urged on behalf of the appellants must consequently succeed in part, that is, in so far as the mortgagee administrator Ali Naki is con-

(1) (1864) 4 De J. & S. 345.

(2) (1839) 1 Beav. 529.

(3) (1887) 34 Ch. D. 732.

(4) [1901] 2 Ch. 160.

(5) (1840) 7 M. & W. 264.

(6) (1889) 22 Q. B. D. 537.

(7) (1798) 3 Ves. 628, 631.

(8) (1903) 1 L. R. 27 Bom. 292.

(9) (1904) 1 L. R. 26 All. 318.

cerned, but it must be overruled in so far as the representative of the other mortgagee is concerned.

In so far as the second ground urged on behalf of the appellants is concerned, it has been argued that the mortgagee other than the administrator who alone, in the view we take, is competent to sue to recover his share of the mortgage money, was bound to bring his suit not against the heirs of the mortgagor but against the administrator in whom the estate of the mortgagor is vested. This argument is, in our opinion, well-founded. The effect of the appointment of Ali Naki as administrator to the estate of the deceased was to vest in him the estate under section 4 of the Probate and Administration Act of 1881. The object of the mortgage suit is to cut off the equity of redemption which is now vested in the administrator as the legal representative of the mortgagor. He is, besides, the person in possession of funds by means of which the mortgage debt may be satisfied. It is difficult to appreciate how, under these circumstances, the claim may be enforced against the son and daughter of the mortgagor. It may be conceded that under order XXXI, rule 1 of the Civil Procedure Code of 1908, in all suits concerning property vested in an administrator or a trustee, although the administrator represents the beneficiaries and it is consequently not ordinarily necessary to make them parties to the suit, yet the Court may, if it thinks fit, order them or any of them to be made parties. This clearly contemplates cases, when for instance as in *Clegg v. Rowland* (1), the trustee is wholly uninterested in the case, or as in *Beresford v. Ramasubba* (2), the trustee has an interest adverse to that of the beneficiary. But clearly in the case before us there is no conceivable reason why the mortgagee other than the administrator should not seek to enforce his security against the property in the hands of the administrator. Reliance was placed by the learned Vakil for the respondent upon the case of *Francis v. Harrison* (3), where it was ruled that a mort-

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(1) (1866) L. R. 3 Eq. 368, 373. (2)* (1889) I. L. R. 13 Mad. 197.

(3) (1889) 43 Ch. D. 183.

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gagee who is a trustee of his mortgage for the beneficial owners of the mortgage money, and who has become bankrupt cannot, as defendant to a foreclosure action by a prior mortgagee, properly represent the beneficiaries who are necessary parties to the action notwithstanding order XVI, rule 8 of the Rules of the Supreme Court, 1883. This principle has clearly no application to the circumstances of the case before us. But it is worthy of remark, as pointed out in the case of *Jaggewar Dutt v. Bhuban Mohan Mitra* (1), that since the date of this decision the rule in England has been modified, so as practically to overrule it. We must hold, therefore, that the suit has been improperly framed and cannot be maintained against the son and daughter of the mortgagor. The objection was urged by the defendants at the earliest possible stage of the proceedings, but was overruled on erroneous grounds, and it was supposed that the cases of *Morley v. Morley* (2), and *Francis v. Harrison* (3), justify the frame of the suit. It is impossible at the present stage to make the administrator a defendant to the suit, because any suit now instituted against him would be successfully met by the plea of limitation. We therefore allow the second objection to prevail and hold that the suit is not maintainable against the heirs of the mortgagor, because the administrator has not been joined as party defendant.

In so far as the third point taken on behalf of the appellants is concerned, it is unnecessary to consider it in detail in the view we take of the first and second grounds, but we may observe that there is obviously no substance in this objection. What is contended by the learned vakil for the appellants is that on the date the *pro forma* defendant had his name transferred from the category of defendant to the category of plaintiff, the claim was barred by limitation in so far as the first security of the 9th June 1894 was concerned and should to that extent have been dismissed. There is, however, no foundation for this contention which is sought to be sup-

(1) (1906) I. L. R. 33 Calc. 425, 437. (2) (1856) 25 Beav. 253.

(3) (1890) 43 Ch. D. 133.

ported by the decision of the Full Bench in the case of *Abdul Rahaman v. Amir Ali* (1). But that decision which relates to the case of substitution of an assignee as a party to a pending litigation has clearly no application to the case before us. The decision of the Full Bench in *Pyari Mohan v. Kedar Nath* (2), shows that the suit, though it was commenced by one mortgagee cannot be said to have been improperly framed when the co-mortgagee was joined as a *pro formâ* defendant who was thus afforded ample opportunity to have his name transferred to the category of plaintiff. Nor can it be contended that section 22 of the Limitation Act operates as a bar, because as pointed out in the cases of *Nagendrabala Debya v. Tarapada Acharjee* (3) and *Khadir Moideen v. Rama Naik* (4), the transfer of the name of a *pro formâ* defendant to that of the plaintiff cannot rightly be treated as the addition of a new plaintiff within the meaning of section 22 of the Limitation Act. We must consequently hold that there is no substance in the objection of limitation urged on behalf of the appellants.

In support of the fourth ground urged on behalf of the appellants, it has been contended that even if a decree for the principal amount can be made in favour of the mortgagees, they ought not to be allowed any interest from the date when, upon appointment as administrator, one of the mortgagees had ample assets placed in his hands to satisfy the mortgage debt. In support of this proposition, reliance has been placed upon the case of *Adams v. Gale* (5). In the view we take of the first two grounds advanced on behalf of the appellants, it is unnecessary to decide this question. But we may point out that the contention is obviously based on principles of justice equity and good conscience, and is supported by the decision of the Supreme Court of the United States in *Page v. Lloyd* (6). The majority of the Court there decided, on the authority of Lord Hardwicke in *Robinson v. Cumming* (7), that an

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(1) (1907) I. L. R. 34 Calc. 612. (4) (1892) I. L. R. 17 Mad. 12.

(2) (1899) I. L. R. 26 Calc. 409. (5) (1740) 2 Atk. 106.

(3) (1908) 8 C. L. J. 286. (6) (1831) 5 Peters 304.

(7) (1742) 2 Atk. 409, 411.

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executor or administrator was bound, if he had assets in his hands, to satisfy his own debt, but that if, as a matter of fact, he had omitted to do so, the debt would not be extinguished, although he might, if he paid debts not on interest and permitted his own to run on interest, disentitle himself to interest. It has been stated to us that at the time of the commencement of the present action one of the mortgagees was still in possession of the estate of the mortgagor as administrator. A question may consequently hereafter arise whether it may not be open to him still to exercise his right of retainer. If such question arises, the position may possibly be maintained that no interest should be allowed upon the mortgage debt from the date when sufficient assets became available to the administrator for repayment of the mortgage money. It is unnecessary, however, in the present proceedings to adjudicate upon this matter finally. It is sufficient for us to hold that in so far as the mortgagee administrator is concerned, he is not entitled to maintain this action, while in so far as the other mortgagee is concerned, the suit is improperly framed; it has been erroneously constituted, because he has sued not the administrator but the son and daughter of the mortgagor who cannot be rendered liable so long as the estate continues to be vested in the administrator. In this view, the suit must obviously fail. We may add that we do not regret this conclusion, because it is plain from the circumstances that a desperate attempt has been made by the administrator and his co-mortgagee to prejudice the position of the infant representatives of the mortgagor. Though the administrator had assets in his hands available for the full satisfaction of the mortgage debt, he has allowed the interest to accumulate for the reason, no doubt, that the interest was at the high rate of 24 per cent. per annum. The administrator should undoubtedly have satisfied the mortgage debt as soon as sufficient assets became available for the purpose, and no Court of justice will assist him in his endeavour, through his co-mortgagee, to realise from the infants Rs. 1,524 when the principal sum advanced was only Rs. 400.

The result, therefore, is that this appeal must be allowed, the decree of the Courts below discharged, and the suit dismissed with costs throughout.

C. B.

Appeal allowed.

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PRIVY COUNCIL.

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Dec. 2

[On appeal from the Chief Court of the Punjab, at Lahore.]

Will—Execution of will—Proof of capacity of testator to execute will—Undue influence—Evidence of exercise of such influence—Absence of evidence of any coercion—Question of fact, whether property was ancestral or acquired—Concurrent decisions on fact.

In this case the question was as to the capacity of a testator to execute a will propounded by the appellants; and it was alleged that they had exercised undue influence over him in the matter of the execution whilst he was admittedly very seriously ill, though the evidence was to the effect that he was in possession of his senses and understood what he was doing when he signed the will.

Held (reversing the decision of the Chief Court of the Punjab), that, so far as the charge of exercising undue influence was concerned, all that was shown by the respondents who were attacking the will was that there was motive and opportunity for the exercise of such influence by the appellants, and that some of them in fact benefited by the will to the exclusion of other relatives of equal or nearer degree. Circumstances of that character might suggest suspicion, and would certainly lead the Court to scrutinise with special care the evidence of those propounding the will. But, in order to set it aside, there must be clear evidence that the undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property. Such evidence was not only lacking in this case, but, in the opinion of their Lordships of the Judicial Committee, the circumstances attending the making and execution of the will were not reasonably consistent with it.

* *Present*: LORD MACNAGHTEN, LORD MERSEY, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.

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Held, also, that, under the circumstances, the evidence as to capacity was not displaced by mere proof of serious illness and of general intemperance, and that the appellants had discharged the onus which lay on them of proving that the will was duly executed by the testator while in his proper senses.

The question whether property was ancestral or not, was held to be substantially one of fact, and therefore subject to the usual practice of their Lordships not to interfere where two Courts had concurrently found it was not ancestral but self-acquired.

APPEAL from a judgment and decree (17th June 1907) of the Chief Court of the Punjab, which reversed the judgment and decree (16th December 1902) of the District Judge of Hoshiarpur.

The defendants were appellants to His Majesty in Council.

The appeal arose out of a suit brought by the respondents for a declaration of their reversionary title to the estate of one Shib Singh, who died on 23rd June 1898, possessed of considerable immovable property.

The plaintiffs in their plaint stated that on his death mutation of names in respect of his property was effected in favour of Musammat Charan Kaur, his widow; that in February 1899 Harbans Singh, 4th defendant, had, under the guardianship of his father, Jawala Singh, instituted a suit against Charan Kaur for a declaration of his proprietary rights in a portion of the property left by Shib Singh, basing his claim on a will dated 11th June 1898, which he alleged had been executed by Shib Singh in favour of himself and Bur Singh and Tara Singh, the 2nd and 3rd defendants, which suit was compromised on 16th October 1900; that the parties to that suit and Bur Singh and Tara Singh conspiring together, with a view to prejudice the plaintiffs, entered into a settlement under the deed of compromise to the effect that on the death of Charan Kaur, Harbans Singh, Bur Singh and Tara Singh should be the owners of the land held by her under the will; that at the time Shib Singh was alleged to have executed the will "he was seriously ill, weak, really at death's door, and not in possession of his right senses and intellectual powers, and was under the undue influence of Jawala Singh and Bur

Singh: he was then unable to understand the effect and contents of the will. The will was executed in the presence and under the undue pressure of Jawala Singh and Bur Singh. Hence the said will (if it be considered to have been executed by him) is unlawful and null and void, and it cannot affect the reversionary rights of the plaintiffs;" that the immoveable property mentioned in the will was ancestral, and the powers of Shib Singh were limited in regard to it, and for that reason also the will could not affect the plaintiffs' rights; that according to law and custom Shib Singh was not in any way competent to execute the will; and that "under all the circumstances the will and the deed of compromise dated 16th October 1900, which was executed in consequence of the will, cannot in any way affect the plaintiffs' reversionary rights: the plaintiffs and defendants other than the widow are entitled to get the property mentioned in the will in proportion to ancestral shares after the death of Charan Kaur, who has a life interest therein."

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The prayer of the plaint was for a declaration in those terms.

The defendants, except Charn Kaur and Harbans Singh, were also reversioners of Shib Singh. Bur Singh and Tara Singh, in their Written Statement, asserted that Shib Singh executed the will without any undue pressure whilst in the enjoyment of his right senses and sound intellect, and that the plaintiffs had no right to raise the plea of undue influence; that the immoveable property in dispute was not ancestral; that "Ram Singh, our grandfather, brought up the grandfather and the father of Shib Singh, and also Shib Singh himself and his brother Dalip Singh, and rendered other services to them. After the death of Ram Singh we rendered services to Shib Singh, helped him in the management of his cultivation work, and conducted all his affairs, hence, even if it be proved that the lands and houses are ancestral, still it is, at all events, lawful according to law and custom to make a will in favour of some of the collaterals in recognition of services, and Shib Singh was consequently

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competent in every way to execute the will;" and that the plaintiffs were not in any way entitled to the property in suit after the death of the widow Charan Kaur.

Harbans Singh, in a separate written statement, made the same allegations as Bur Singh and Tara Singh as to the execution by Shib Singh, and the validity of the will and as to the property not being ancestral; and alleged, further, that he was the sister's son of Shib Singh who had brought him up from his birth as his own son, and had constituted him his heir to which the plaintiffs had all along been consenting parties.

The case was heard and the evidence taken by two different Judges of the District Court at Hoshiarpur, and was decided by a third on a consideration of the evidence recorded by his predecessors. He held that the will was duly executed by Shib Singh while in his proper senses, and that no undue influence was proved; that the property had never belonged to a common ancestor of the parties and was therefore not ancestral in the sense in which that term was understood in the customary law, but was self-acquired; that Harbans Singh had been adopted or appointed his heir by Shib Singh in 1887, the adoption of a sister's son being valid by the custom of the parties who were Sohota Jats of the district of Hoshiarpur; that the plaintiffs were aware of the adoption, and had throughout consented to the appointment of Harbans Singh as heir of Shib Singh; and that the will was valid by custom, whether the property of which it disposed was ancestral or self-acquired.

On these findings the suit was dismissed with costs. An appeal to the Chief Court of the Punjab was heard by a Divisional Bench of that Court (Mr. H. A. B. Rattigan and Mr. Lal Chand), who agreed with the finding of the District Judge that the property was not ancestral, but differed from him as to the adoption or appointment of Harbans Singh, which they held was not established. As to the will, they found that, though it was executed by Shib Singh, and signed by him while in his proper senses, it had not been executed by him

voluntarily, but under undue influence exercised by Bur Singh and Jawala Singh. The reasons for their decision on that point were as follows:—

“The next question is whether Shib Singh executed the will of the 11th of June 1898 voluntarily and with full knowledge of its contents and consequences?

It may at once be conceded that the will was actually executed by Shib Singh, and we see no reason to doubt the evidence of the Rev. Mr. Chatterji and Dr. Datta that on the day when the testator signed the will he was in his senses, or, in other words, that he was not unconscious or wandering in his mind. This much may be admitted. But it by no means follows from this that the will was voluntarily executed. On the contrary, from the evidence on the record, we are satisfied that at the time when the will was made the testator was in a condition which rendered him powerless to withstand the influence of Bur Singh and Jawala Singh. He was practically at death's door, and he had been removed to the house of a Muhammadan, one Talamand. The evidence of Lala Narain Das and Mian Beli Ram shows that he was at this time in an utterly helpless condition, and it is not denied that Talamand, in whose house he spent his last days on earth, refused to sign the will as a witness. All this time Bur Singh and Jawala Singh were in close attendance upon him, and it is not strange, therefore, that they eventually succeeded in getting him to agree to anything they suggested. The unfortunate man was probably ready to agree to anything, provided he was left in peace, and he therefore was prevailed upon to sign a will leaving the whole of his property to whomsoever it might please these two persons to assign it. But, even under these circumstances, he does seem to have objected to the proposal to leave his wife, Musammat Charan Kaur, practically penniless. But with this last effort to do something for his wife, his will gave way, and, as regards all other matters, he was not in a position to gainsay Bur Singh and Jawala Singh. There was no reason whatever why he should select Bur Singh as the one of his reversioners who was entitled to special consideration. It is no doubt alleged that Bur Singh and his grandfather, Ram Singh, rendered services to the deceased, but of these alleged services there is no real proof. The oral evidence on the point is of the vaguest possible kind, and therefore of no value. Nor is it very clear how a young man, such as Shib Singh, would be in need of such services. On the other hand, there is ample documentary evidence to show that, until he was helpless, and on his dying bed, Shib Singh was by no means friendly disposed towards Bur Singh. In 1894 there was such enmity between Shib Singh and Bur Singh that they were both called upon to give security to keep the peace. In 1896 Bur Singh was the principal plaintiff in the suit brought by the reversioners to have one of his alienations declared null and void, and, on the 4th March of that year, Bur Singh, when cross-examined on behalf of Shib Singh, had to admit that on the death of Musammat Jas Kaur, Shib Singh's sister-in-law, for whom Bur Singh acted as agent, Shib Singh had his house searched

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with a view to finding sundry articles which Shib Singh alleged had been stolen by Bur Singh. He also admitted that he had brought a criminal case against Shib Singh's servants. Admittedly, therefore, up to 1896 the deceased and Bur Singh were on the very worst possible terms, and there is no evidence whatever to show that his hostility suddenly came to an end, and that the two became so entirely reconciled that Shib Singh, of his own free accord, elected to leave his property partly to his alleged adopted son, Harbans Singh, and partly to Bur Singh and Bur Singh's brother, Tara Singh. Assuming for the sake of argument that Bur Singh's grandfather, Ram Singh, looked after Shib Singh when the latter was a mere youth at school, we still fail to find any reason why Shib Singh, had he been a free agent, should have gone out of his way on his death-bed to specially favour that one of his collaterals with whom he had during his lifetime been at bitter enmity. The witnesses who say that Bur Singh rendered services to Shib Singh give no details as to time and place, and obviously it was not necessary to show that after 1896 (when the two were on the most hostile of terms) a reconciliation took place, and that Bur Singh's conduct towards the deceased so entirely changed that he who had been an enemy became a violent partisan of the deceased, and remained so up to the date of the latter's death. Of course, once Shib Singh became utterly helpless, and incapable of exercising his own free will, it is quite possible—indeed, it is proved—that Bur Singh and his friend, Jawala Singh, took entire charge of him for purposes of their own. This, however, is a very different thing from saying that Bur Singh was the one collateral whom Shib Singh was anxious, when in possession of his full faculties, of benefiting after his death. In our opinion Shib Singh, at the time when he executed the will (a few days before his death), was in an utterly helpless condition and completely at the mercy of Bur Singh and Jawala Singh. He was a mere tool in their hands, and the so-called will was the will, not of the person who signed it as testator, but of the two persons who took advantage of his helplessness to force or induce (it matters not which) him to execute it for their benefit.

For the reasons given we hold that the will signed by Shib Singh was not executed by him of his own free accord."

In the result the plaintiffs obtained a decree for the relief prayed for.

On this appeal,

Sir H. Erle Richards, K.C., and *Gurcharn Singh*, for the appellants, contended that as both the Courts in India had practically found that Shib Singh had signed the will while in his proper senses, on that issue the appellants were entitled to succeed, unless it had been shown that the testator was induced by undue influence exercised by the appellants over

him such as made the execution of the will not a voluntary act on his part. The Chief Court had proceeded to find that the testator had not executed the will "of his own free accord," but that Bur Singh and Jawala Singh "had forced or induced him to execute it for their benefit." But it was submitted that the Chief Court was in error in so holding, because there was no evidence on the record to support that finding. As to the mode of the execution itself, there could be nothing but conjecture so far as the respondents were concerned, for none of them were, according to their own account, aware of the execution, nor present at the time; and there was no sufficient proof given otherwise of any such undue influence having been exercised. To establish undue influence, which would invalidate the will, it must be proved that the testator was coerced or defrauded into doing that which he was not desirous of doing; but here there was no coercion of any kind shown, and no fraud was even alleged. Reference was made to *Wingrove v. Wingrove* (1), *Boyse v. Rossborough* (2), and *Bandains v. Richardson* (3). The property was found to be acquired property by both the Courts below, and the Chief Court, in their judgment, said there were admissions by the pleader to that effect; and, that being so, the testator was fully competent to make the will, and it should be upheld. It was also contended that Harbans Singh had, on the evidence, been clearly proved to have been adopted or appointed as his heir by Shib Singh, and the validity of such adoption could not now be disputed, a suit to set it aside being barred by lapse of time.

DeGruyther, K.C., and *B. Dube*, for the respondents, contended that they were entitled to succeed, unless the will was established or the adoption of Harbans Singh proved, the onus of proving both issues being entirely on the appellants: and it was submitted that neither issue had been maintained on the evidence nor in law. The will was not valid by custom of the parties, but was inequitable and would affect only

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(1) (1885) L. R. 11 P. D. 81. (3) [1906] A. C. 169;

(2) (1857) 6 H. L. C. 2, 49. 22 T. L. R. 333.

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self-acquired property, and not ancestral property. Reference was made to the Digest of Customary Law of the Punjab by Sir W. Rattigan, 7th ed., page 19, section 11; page 27, section 23; page 34, section 24; and page 94, section 59; and to the case of *Natha Singh v. Harnam Singh* (1). A sister's son would not succeed to the estate of a deceased brother; so Harbans Singh would not be heir to Shib Singh, and his adoption had not been proved. After Shib Singh's death the village patwari reported, on 10th August 1898, that Shib Singh had "died sonless;" and during the mutation proceedings Harbans Singh did not put forward any claim as adopted son or heir of Shib Singh.

The question of whether the property was, or was not, ancestral was a question of law and fact. [*Sir Erle Richards, K.C.*, said he had opened the case on the footing that the property was not ancestral in view of the admissions made in the Chief Court and the concurrent decisions of both the lower Courts. *DeGruyther, K.C.*, wished to raise the question, unless it was ruled out. LORD MACNAGHTEN. It was a question of fact on which the Courts in India had concurred, and it therefore could not be raised now.]

As to the will, Shib Singh had not a sound and free disposing mind at the time of its execution. The evidence showed him to have been "seriously ill and in a dying condition" when he came to the Court of the District Judge on 2nd June 1898. On 11th June 1898, the day when the will was said to have been made, the Sub-Registrar was sent for to go and register "the will made by Shib Singh, who is lying ill." But when the Sub-Registrar went, no will was produced for registration, and the Sub-Registrar, after waiting for some time, came away. His evidence was that Shib Singh was not then "in his proper senses, nor of a sound disposing mind;" yet the will was said to have been executed soon after the Sub-Registrar had left, and it was never registered. For the reasons also given by the Chief Court it was submitted that the will was not a voluntary

testament of the deceased Shib Singh, but that during his illness, in which he was attended by Jawala Singh and Bur Singh, he was completely under the power and influence of those persons. No hard-and-fast rule was laid down in the cases as to undue influence that when a testator had a will read over to him, and had executed it, further inquiry was shut out. Reference was made to *Fulton v. Andrew* (1), *Barry v. Butlin* (2), and *Harwood Baker* (3).

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The appellants were not called on to reply.

The judgment of their Lordships was delivered by

LORD ROBSON. The main question in this appeal is as to the validity of the will of one Shib Singh, who was a Hindu Jat, residing at Garhdiwala in the district of Hoshiarpur in the Punjab.

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There is a further point as to whether a portion of the land comprised in the will is ancestral property or not. That question is substantially one of fact. Both the Courts below are agreed in finding that the property in dispute was acquired, and no reason has been shown to their Lordships which would justify them in coming to a different conclusion.

Shib Singh fell seriously ill in May 1898. The will in dispute was made by him on the 11th June 1898, and he died on 23rd of the same month. It is alleged by the respondents in their plaint that the will was executed when he was seriously ill, weak,—really at death's door,—and not in possession of his right senses and intellectual powers, and was under the undue influence of Jawala Singh, father of the defendant, Harbans Singh and Bur Singh."

None of the Judges had the advantage of seeing the witnesses, as the evidence was taken wholly on deposition before the trial. There was very little conflict of evidence on the particular facts alleged, so far as those facts were material to the making of the will or the condition of the testator, and the only question for the Courts was whether, on such facts, the

(1) (1875) L. R. 7 H. L. 448.

(2) (1838) 2 Moo. P. C. 480.

(3) (1840) 3 Moo. P. C. 282.

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Shib Singh was brought from Garhdiwala to Hoshiarpur for medical treatment on the advice of Mr. Chatterji, a mission teacher, with whom he was acquainted, and was placed under the care of two doctors. He was accompanied by his relative, the defendant Bur Singh, and his brother-in-law, Jawala Singh. His physical condition became, no doubt, rapidly worse, and he, or someone about him, sent for his lawyer, Pandit Jagan Nath, in order to take instructions for his will. This gentleman gave evidence for the appellants. He was an old friend and school-fellow of the testator, and had been his counsel in practically all his litigation. He took his instructions from Shib Singh himself, and visited him for that purpose on several occasions before the day on which the will was executed. It cannot be said that, so far as the relationship of the beneficiaries to the testator is concerned, there was anything unnatural or unusual in the will. An allowance for maintenance was made to the wife; certain property was left to the defendants Bur Singh and Tara Singh, who were relatives, and whose grandfather is stated to have had care of Shib Singh when the latter was a boy and to have rendered him important services. The remainder of the property went to his nephew, Harbans Singh, who had been born in Shib Singh's house and brought up by him, he himself being childless.

The will was dictated by the Pandit Jagan Nath (in the presence of Shib Singh) to a petition writer, Mahdo Ram, who knew Shib Singh. Dr. Datta and several zemindars were also present. While the dictation was going on Shib Singh made various observations on the clauses, and some alterations were made at his suggestion in the draft; for instance, he increased the provision for his wife. Dr. Datta afterwards read the completed document over to him and satisfied himself by questions that he understood it, and it was duly signed. Jagan Nath had previously sent for the Registrar to have the will registered, but the Sub-Registrar had come and gone before the will was signed, and in the course of conversation on this sub-

ject Shib Singh said he was under the treatment of doctors and he would have it signed by them. On the following day, therefore, both doctors signed it, and, according to the custom of their profession in India in such cases, they added a statement of their opinion that the testator, though ill, was in his senses. Dr. Datta gave evidence at the trial in favour of the will, but Dr. Duni Chand had in the meantime died.

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It would be difficult to have a stronger *primâ facie* case in favour of the will, and it was fully accepted by the District Judge. The Chief Court also say that they "see no reason to doubt the evidence of the Rev. Mr. Chatterji and Dr. Datta that on the day when the testator signed the will he was in his senses, or, in other words, that he was not unconscious or wandering in his mind," but they are of opinion that he was "in a condition which rendered him powerless to withstand the influence of [the defendants] Bur Singh and Jawala Singh," who were in close attendance upon him, and in whose hands the Chief Court think that "he was merely a tool." They add that, in their opinion, those defendants "took advantage of the testator's helplessness to force or induce him to execute it for their benefit." Their Lordships are unable to find any evidence on the Record which would justify this conclusion.

The testator had been a man of intemperate habits, and was within 12 days of his death when the will was made; but there is no evidence to indicate that he was not sober, or not of a sound disposing mind, when he was transacting the business of his will on the 11th June. Nor is there any evidence whatever that the defendants Bur Singh and Jawala Singh used the undue influence which is alleged beyond the bare fact that they were the relatives who accompanied Shib Singh to Hoshiarpur, and were selected by him for benefits under the will.

It is stated that up to 1896 Bur Singh and Shib Singh were at enmity, and that there were open quarrels and litigation between them. That does not appear, however, to have prevented the testator from afterwards employing Bur Singh in the management of his lands, or from sharing his table with

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him. The District Judge finds that Bur Singh's services to the testator are proved both from documents and from the oral evidence of very respectable witnesses. These old family quarrels do not, therefore, of themselves, show that Bur Singh could not have been a person whom the testator desired to benefit.

It was alleged on the part of the defendants that Harbans Singh had been duly adopted by Shib Singh as his son, and the District Judge found this adoption proved. The Chief Court differed from him on this point, and drew some inferences unfavourable to the defendants' case generally from the fact that the allegation had been put forward. It is unnecessary for their Lordships to decide the question of adoption, but they are of opinion that the evidence given in relation to that question gives rise to no material reflection on the evidence of the independent witnesses in support of the will. The Chief Court treat the evidence of Jagan Nath as not quite "beyond criticism," because, in their opinion, he acted in the matter of the will as though he were ignorant of facts disclosed in previous proceedings relating to the position of Harbans Singh and Bur Singh, which it was thought probable he would remember, but they do not go so far as to reject or discredit his testimony. Indeed, Jagan Nath was not cross-examined on these points, and there is really nothing in them which is not susceptible of explanation without reflecting in any way on his independence and good faith as a witness.

With regard to the Rev. Mr. Chatterji, it was suggested apparently as a circumstance of suspicion against him that he had at one time bought a piece of land for his mission from Shib Singh; but there is nothing to show that the transaction was not a normal and perfectly proper matter of business.

No suggestion is made against the good faith of the doctors or of Mahdo Ram.

The onus of proving the testamentary capacity of Shib Singh of course lies on those by whom the will is propounded, and in their Lordships' opinion they have discharged that obligation by the evidence indicated above. Such evidence is

not displaced by mere proof of serious illness and of general intemperance, and yet that is as far as the evidence of the respondents can fairly be said to go. So far as the charge of undue influence is concerned, all that is shown on the part of those attacking the will is that there was motive and opportunity for the exercise of such influence by the defendants, and that some of them in fact benefited by the will to the exclusion of other relatives of equal or nearer degree. Circumstances of that character may sometimes suggest suspicion, and would certainly lead the Court in the present case to scrutinise with special care the evidence of those who propound the will; but in order to set it aside there must be clear evidence that the undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.

Such evidence is not only lacking in this case, but, in the opinion of their Lordships, the circumstances attending the making and execution of the will are not reasonably consistent with it.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed with costs, and the judgment of the Chief Court set aside, and that of the District Court restored with costs in both Courts.

Appeal allowed.

Solicitor for the appellants: *Edward Dalgado.*

Solicitors for the respondents: *T. L. Wilson & Co.*

J. V. W.

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CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

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NALOO PATRA

v.

EMPEROR.*

False evidence—False statements in an application for mutation proceedings—Obligation to make a true declaration therein—Verification of application—Validity of Rules of the Board of Revenue, Chap. V, rule (5)—Penal Code (Act XLV of 1860), ss. 191, 193—Land Registration Act (Beng. Act VII of 1876), ss. 42, 53, 88.

An applicant for mutation of names under section 42 of the Bengal Land Registration Act is bound by Rule 5, Chapter V, of the Rules of the Board of Revenue, framed under section 88 of the Act, to make a true declaration on the subject of his application, and is punishable under sections 191 and 193 of the Penal Code for making false statements therein.

Debi Saran Misser v. Emperor (1) referred to.

Queen-Empress v. Appayya (2); *Durga Das Rukhit v. Queen-Empress* (3); *Ezra v. Secretary of State* (4); and *British India Steam Navigation Co. v. Secretary of State for India* (5) distinguished.

Rules passed by the Board of Revenue under section 88 of the Act, provided they refer to the procedure as to presentation, admission and verification of an application for registration under Part IV of the Act, and as to inquiries under section 52 thereof, have the force of law.

ONE Parbati Dai died intestate, leaving her surviving Hari Charan Shahu, the son of Hridananda, who was a brother of her husband, and three daughters, one of whom was Tula Dai, the wife of the petitioner Naloo Patra, and the mother of Nidhi Patra. Tula having been dispossessed by Hari Charan in 1903, instituted a suit against him, in the Court of the Munsiff of Jaipur, for declaration of her title and the recovery of possession of two plots of certain lakhiraj lands which she claimed to have fallen to her share by agreement with her

* Criminal Revision, No. 1343 of 1910, against the order of G. S. Macpherson, Sessions Judge of Cuttack, dated Sept. 22, 1910.

(1) (1907) 11 C. W. N. 470. (3) (1900) I. L. R. 27 Calc. 820.

(2) (1891) I. L. R. 14 Mad. 484. (4) (1902) I. L. R. 30 Calc. 36.

(5) (1910) I. L. R. 38 Calc. 230.

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sisters. She died during the pendency of the suit, and her son, Nidhi Patra, was substituted as a party. The Munsif passed a decree, on the 30th May 1909, declaring Nidhi entitled to one plot, and asserting his right to recover possession of the same from Hari Charan. On appeal, the District Judge of Cuttack reversed the Munsif's order, on the 25th June, holding that Nidhi took no share in his mother's property, and that it ceased to be *stridhan* on her death. The petitioner was aware of the Judge's decision and its terms. On the 18th March 1910 he presented to the Land Registration Deputy Collector an application under section 42 of the Bengal Land Registration Act, on behalf of his son Nidhi, for mutation in place of Hari Charan, alleging the former's possession since 1902 and title by right of inheritance, and stating that, after the death of Parbati, Tula was in possession and Nidhi after her decease, that, Hari Charan having attempted to disposses Tula, she brought a suit against him, which was decreed by the Munsif a copy of whose judgment was filed, and that he got his name registered as proprietor by fraud and concealment of such decree. He prayed that, in consideration of the decree filed, necessary orders for mutation might be passed. The application was in the form (Misc. No. 225-A) prescribed by the Rules of the Board of Revenue framed under section 88 of the Bengal Land Registration Act, and contained the following verification in the form laid down in Chapter V, Rule (5), of the Board's Rules:—"The facts set forth above are true to my knowledge." The Deputy Collector examined the petitioner, who stated that he based his claim for mutation on the Munsif's decree, and granted sanction on the 11th September 1910, to prosecute him under section 193 of the Penal Code for having made a false declaration in his petition of the 18th March. The accused was then tried and convicted thereunder, on the 18th August, and sentenced to six months' rigorous imprisonment by Babu S. C. Bose, Deputy Magistrate of Cuttack. An appeal against the conviction was dismissed by the Sessions Judge of Cuttack on the 22nd September. He thereupon obtained a Rule from the

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High Court to set aside the order of the Magistrate in the terms set out in the Judgment below.

Mr. A. K. Ghose and Babu Chandra Sekhar Banerjee,
 for the petitioner.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate of Cuttack to show cause why the conviction of, and sentence passed on, the petitioner should not be set aside, on the ground that a statement made in an application under the Land Registration Act is not necessarily a declaration within the meaning of section 191 the Indian Penal Code.

We have heard counsel in support of the Rule and the learned Deputy Legal Remembrancer showing cause, and we have considered sections 53 and 88 of Act VII of 1876, and the rulings on what are said to be analogous points, for which we have been referred to the case of *Queen-Empress v. Appaya* (1), and to a case under the Land Acquisition Act, namely, the case of *Durga Das Rukhit v. Queen-Empress* (2), which has been followed in the case of *Ezra v. Secretary of State* (3) and in the recent case of land acquisition known as the *Bracebridge Hall Case* (4). But all these cases turn on the fact that the statements were not made to a Court nor to any one authorised to take down such statements on oath. Now under the Land Registration Act, with which we are now dealing, the case is quite different. The Collector under that Act is a duly constituted Court, and is empowered by section 53 to summon and enforce the attendance of witnesses and compel them to give evidence, and compel the production of documents by the same means, and, as far as possible, in the same manner, as is provided in the case of a Civil Court by the Code of Civil Procedure. Moreover, under section 88, it is laid down that there are to be, under this Act, rules made for the presentation, admission and verification of applications for registration, and the

(1) (1891) I. L. R. 14 Mad. 484.

(3) (1902) I. L. R. 30 Cal. 36.

(2) (1900) I. L. R. 27 Cal. 820.

(4) See *ante*, p. 230.

Board is directed, within four months of the date on which this Act comes into force, to make general Rules, consistent with this Act, to regulate the form in which registers under this Act are to be kept, and to cancel or alter from time to time any such Rules. Now it may be said that the Rules themselves are not part of the law. But the mandate given by the law is that the Collector is to have power to make some kind of verification, on the application, and that verification may, under section 53, be on oath. It seems to us clear that this declaration comes within the meaning of section 191 of the Indian Penal Code, namely, that a claimant asking for land registration is bound by law to make a true declaration upon the subject of his application, and the offence is, as laid down in the case which we have just cited, not in making a verification on oath, but in making a false statement in the course of the verification. We are fortified in this opinion by the decision in the case of *Debi Saran Misser v. Emperor* (1), where a converse proposition is laid down that "Rules passed in the course of a proceeding of the Board of Revenue, and not drawn up by the Board under section 88 of the Land Registration Act, have not the force of law." It is argued that the converse proposition is not necessarily true; but the opinion, which is no doubt an *obiter*, to be derived from the remarks of the learned Judges in that case is certainly the view which we are inclined to take in this case, that Rules passed by the Board of Revenue under section 88, provided they refer to the procedure as to presentation, admission and verification of an application for registration under Part IV, and as to enquiries under section 52, have the force of law by reason of the express enactment of section 88 itself. We, therefore, think that the only point on which this Rule was issued fails, and the Rule is discharged.

The petitioner must surrender to his bail and serve out the rest of his sentence.

Rule discharged.

E. H. M.

(1) (1907) 11 C. W. N. 470.

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Nov. 16, 17;
Dec. 14.

MANINDRA CHANDRA NANDY

v.

SECRETARY OF STATE FOR INDIA.

[On appeal from the High Court at Fort William in Bengal.]

Mines—Coal mines—Royalty received by proprietor of estate from lessees of coal mines—Liability to Cess under Bengal Cess Act (Bengal Act IX of 1880) s. 6 and 72—Return of “annual net profits” of Coal mines.

Held (upholding the decision of the High Court), that a royalty received by the appellant from person to whom he had leased a portion of his estate in Bengal for the purpose of working the coal mines situated therein, was, within sections 6 and 72 of the Bengal Cess Act (Bengal Act IX of 1880), part of the “annual net profits” of the mines, and that he had been properly assessed with cess on such royalty.

The return required by s. 27 was not with regard to the mine-owner's profit, but had reference to the general net profits of the property. The fact that the obligation to make the return was laid on the person most cognizant of the circumstances under which the mine was worked and of the profits derived from it, did not alter the character of the royalty received by the proprietor for his share of the property of the mine.

APPEAL from a decree (7th January 1907) of the High Court at Calcutta, which affirmed a decree (22nd February, 1905) of the Subordinate Judge of Burdwan.

The plaintiff was the appellant to His Majesty in Council.

The main questions for decision on this appeal were: (i) whether royalties paid by the lessees of a coal mine in India to the proprietor form a portion of the annual net profits from the mine upon which road and public works cesses are leviable under Bengal Act IX of 1880; (ii) whether they are payable by or leviable from the said proprietor; and (iii) whether they are so leviable when income tax is payable upon the royalties under Act II of 1886.

Present: LORD MACNAGHTEN, LORD MERSEY, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.

The facts are fully stated in the report of the case before the High Court (RAMPINI AND MOOKERJEE JJ.) which will be found in I. L. R. 34 Calc. 257.

On this appeal,

DeGruyther, K.C., and *Ross*, for the appellant, contended that the High Court had erred in so construing the provisions of the Bengal Cess Act (Bengal Act IX of 1880) as to make them applicable to royalties paid to the landlord by the lessees of mines in his estate, and in deciding that such royalties were assessable with cesses under the Act because they were part of the "annual net profits" derived from the mines; and it was submitted that the appellant was not the "owner" of the mines within the meaning of section 72 of the Cess Act. He was not the person who received the "net annual profits" of the mines, or who could make a return of them. The persons to whom the mines were leased, who worked them, and knew what the actual net profits were, and who got the benefit of them, were the persons intended by the Cess Act to be assessed in respect of, and liable to the taxes due on, the annual net profits. A royalty paid to the proprietor of the land was not part of such profits but part of the expenses of working the mine. "Annual net profits" had not the same meaning as "annual value": see section 6 of the Act. Reference was made also to sections 2, 4, 73, 79, 80, 81, 82, 83 and 98 of Bengal Act IX of 1880. The person or persons who work the mines (in a case like this where they do not own the land) and are liable for payment of the cesses, are those to be served with notice to send in the return, and it was intended that there should be only one assessment: see Schedule E to the Act. As to the construction of Acts dealing with taxation (as that they are to be construed in favour of the persons to be taxed, etc.) reference was made to the remarks of Mr. Justice Mookerjee on that subject at pages 268 and 269 of the report in I. L. R. 34 Calc. and also to pages 287, 288 and the authorities there cited as to the assessment of the same property with a double tax: and it was contended that the appellant was not liable to be assessed in respect of

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the royalty under the Cess Act and also under the Income Tax Act (II of 1886); and that in this respect also the High Court was wrong in deciding that he was so liable.

Cohen, K.C., and *A. M. Dunne*, for the respondent, contended that a royalty paid to the proprietor of the land by the lessees of mines was part of the "annual net profits" of the mines and was liable to taxation under the Bengal Cess Act IX of 1880 as well as under the Income Tax Act. The provisions of the Cess Act as to mines were taken from Bengal Act IX of 1871. A royalty according to English cases was treated as a kind of rent which the lessee of mines paid to the owner of the land in which the mines were situated; and reference was made to the *Coltness Iron Company v. Black* (1); and to sections 71, 72, 73, 76 and 81 of the Bengal Cess Act IX of 1880.

[Counsel for the respondent were here stopped by the Council who called upon the appellant.]

DeGruyther, K.C., replied.

The judgment of their Lordships was delivered by

Dec. 14.

MR. AMEER ALI. The plaintiff is the owner of considerable landed property in Bengal, part of which he has leased to various parties for the working of coal mines. Besides the rent for the surface land he receives, under the designation of royalty, a percentage on the coal raised by the lessees or mine-owners. He has been assessed for "cess" under the provisions of Bengal Act IX of 1880, in respect of the royalty received or receivable by him from the coal-mines on his estate. This Act provides for the levy of "cess" on all immovable property situate in the Province for the construction of roads and other means of communication, and it gives to the "Collector" defined in the Act, the power of making the assessment. For the purposes of the Act, mines, etc., are included in the definition of immovable property, and it is declared that, in the case of lands, the "cess" should be

assessed on their "annual value," and in the case of mines, etc., on "the annual net profits" from such property. The mode of ascertaining "the annual value of lands" and the "annual net profits" from mines, etc., are specifically laid down. The plaintiff contends that the royalty he receives from the coal-mines cannot, upon a proper construction of the Act, be included in the term "annual net profits" and that, therefore, the assessment is illegal.

He accordingly brought a suit in the Court of the Subordinate Judge of Burdwan to obtain a declaration to that effect. This Judge dismissed the action on the 22nd February 1905, and his decision was affirmed by the High Court of Calcutta in two elaborate judgments in which many subsidiary matters have been discussed at considerable length. From the decree of dismissal by the High Court, the plaintiff has preferred this appeal to His Majesty in Council.

In their Lordships opinion the only point for determination in this case turns on the meaning to be attached to the words "annual net profits" in sections 6 and 72 of the Act. Section 6, so far as it is material for the purposes of this decision, is in these terms:—

"The road cess and the public works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, and other immovable property, ascertained respectively as in this Act prescribed."

Chapter V., which begins with section 72, lays down the procedure for valuation, assessment and levy of cesses on mines, etc.

Section 72 is in these terms:—

"On the commencement of this Act in any district, and thereafter before the close of each year, the collector of the district shall cause a notice to be served upon the owner, chief agent, manager, or occupier of every mine, quarry, tramway, railway, and other immovable property not included within the provisions of chapter II., and not being one of the tramways or railways mentioned in section 3, such notice shall be in the form in schedule (E) contained, and shall require such owner, chief agent, manager, or occupier to lodge in the office of such collector within two months a return of the net annual profits of such property, calculated on the average of the annual net profits thereof for the last three years for which accounts have been made up."

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It is contended on behalf of the plaintiff that the term "net annual profits" used in this section means "the net annual profits" of the person actually working the mine, and who or whose agent or manager has to make the return; and that it does not include royalty paid to the proprietor of the land, which stands in the same category as the ordinary expenses and outgoings connected with its working such as boring, haulage, etc. In their Lordships' judgment this contention has no substance. Schedule (E) is referred to as indicating the meaning of the words "net annual profits," but it goes no further than the section itself. It is to be observed that both in section 6 and section 72 the "net annual profits" have reference to the property and not to the individual.

The inference is clear that the return required under the section is not with regard to the mine owner's profits but has reference to the general net profits of the property. The obligation to make the return is laid on the person most cognisant of the circumstances under which the mine is worked and of the profits derived from it. But that does not alter, in their Lordships' view, the character of the royalty received by the proprietor for his share of the profits of the mine. This conclusion is enforced by an examination of the provisions of sections 76, 80, and 81. Section 76, which provides for the valuation of property assessable under chapter V. where the annual net profits cannot be ascertained by the officer making the assessment, speaks again of the property itself, and declares that in such eventuality "he [that is the Collector] may by such ways or means as to him shall seem expedient, ascertain and determine the value of such property, and shall thereupon determine six percentum on such value to be the annual net profits thereon." The language of the section leaves little room for doubt that the annual net profits are to be taken as a whole. Section 80 provides for service on the person making the return under section 72 of a notice "showing the amount of road cess and public work cess payable in respect of such property." This again clearly shows that although the cess is assessed on the basis of the net annual

profits, it is paid in respect of the property, and not in respect of any part of the profits.

Section 81 deals with cases where the "occupier of such property" is different from the "owner," and provides the mode by which, in case he pays more than his share of the cess, he might recover such excess. In this section the word "owner" appears to be used in the sense of proprietor. It is clear, however, that the liability for the cess lies on both "occupier" and "owner" in the case of mines, etc., as in the case of land it lies on holders of estates or tenures and ryots, the policy of the Act evidently being that all persons, who benefit by the maintenance and construction of "roads and other means of communication" or "works of public utility" out of these cesses, should bear the liability of paying the same.

On the whole their Lordships are of opinion that the conclusion at which the lower Courts have arrived is correct, that the royalty receivable by the plaintiff is part of the net annual profits of the mine and that he has been properly assessed with cess thereon. This appeal consequently fails.

It has been found by the Courts in India that the plaintiff has not been prejudiced by any irregularity on the part of the Collector in the mode of assessment; their Lordships do not feel called upon to express any opinion on the question of the procedure he should have adopted.

The appeal must, in their Lordships judgment, be dismissed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitors for the appellant: *Watkins & Hunter.*

Solicitor for the respondent: *The Solicitor, India Office.*

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ORIGINAL CIVIL.

Before Mr. Justice Stephen.

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Secretary of State for India—Liability in respect of Contract of service—Pay and Pension—Cause of action—Pensions Act (XXIII of 1871) s. 4.

The plaintiff, who was in the Educational Department drawing a salary of Rs. 150 a month, was in 1881 employed by the Government on special duty under an agreement, one of the terms being "from the 1st September 1881 his pay will be raised during good behaviour to Rs. 300 a month." It was assumed that this meant "for the term of his natural life." The special duty was completed, but the plaintiff, in spite of his protests was retained on deputation till 1902, when he was made to revert to the Educational Department and was retired in 1904. Since or from shortly before his retirement he was paid only Rs. 150 a month. In an action instituted by the plaintiff against the Secretary of State for a declaration that he was entitled to be paid Rs. 300 a month for his natural life, and for arrears on the basis of that figure:—

Held, that the plaintiff must be taken to have treated the whole of his service under Government as one service, and that anything payable to him after the termination of that service was in the nature of a "pension" within the meaning of section 4 of the Pensions Act of 1871, and hence the suit was not maintainable.

ORIGINAL SUIT.

In the year 1881, the plaintiff who was then a Deputy Inspector of Schools in the Educational Department of the Government of Bengal, drawing a salary of Rs. 150 per month, undertook a journey to Tibet under an agreement come to with the Government. The terms of the agreement were embodied in a document dated the 4th September 1881, signed by Mr. Cockerell, Secretary to the Government of Bengal, and were shortly as follows:—

Sarat Chandra Das was to journey to Lhasa, record any points of interest he may note with regard to places and people, avoid general observation, pursue investigations into

* Original Civil Suit 194 of 1908.

the religion, literature and history of Tibet, take observations for a route survey, and return to India within twelve months. He was to receive articles of the value of Rs. 5,000 wherewith to defray his expenses. There was a further stipulation—"from the 1st September 1881 his pay will be raised during good behaviour to Rs. 300 a month." It appears that in the original agreement the last mentioned clause contained the words "permanently or" between the words "raised" and "during," but on the agreement being submitted for sanction to the Government the words "permanently or" were eliminated. It was suggested, however, by the plaintiff that he had received definite assurances from the Government that he would be paid this sum during the period of his natural life.

It was alleged in the plaint, but denied in the written statement, that the journey to Tibet was undertaken for State purposes. The plaintiff completed his journey and returned to Darjeeling on the 27th December 1882. Since September 1881 he was in receipt of Rs. 300 a month and this was continued on his return from Tibet. It was alleged by the plaintiff that he was retained by the Government on deputation, although nominally in the Education Service, till September 1902, that he repeatedly applied to the Government to be treated as a member of the Education Service, so as to be entitled to the emoluments and promotion to be attained in that service, that the Government refused to accede to his application on the ground that he had been by special contract provided with Rs. 300 for life, and that finally, in September 1902, he was compelled to revert to the Education Department as a preliminary to making him retire as a member thereof. The plaintiff was placed on furlough in February 1902: from the 25th May 1903 he was paid only Rs. 150 per month, and was retired in 1904.

The plaintiff gave notice of suit to the Government in 1906 and instituted the present action in 1908. The suit was for a declaration that the plaintiff was entitled to be paid Rs. 300 a month for his natural life, and for a decree for the

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sum of Rs. 8,160 remaining unpaid to him, since the 25th May 1903 at the rate of Rs. 150 per month.

It was alleged in defence, that up to his retirement in 1904 the plaintiff was paid a salary of Rs. 300 a month in terms of the agreement, and thereafter he was paid and was still being paid a pension of Rs. 150 a month in accordance with the rules of his service. It was further contended that the plaint disclosed no cause of action against the defendant.

Mr. S. P. Sinha (with him *Mr. Kenrick, K.C., Advocate-General* and *Mr. R. C. Bonnerjee*), for the defendant. This suit is not maintainable. There is no distinction in principle between pay and pension. An agreement to serve is indivisible and the remuneration is called "pay" during service and "pension" after service. A suit for pension must be based on a contract of service. In England no suit lies against the Crown on a contract of service; as long as it is a contract of service, it does not matter whether it was in the course of a public or private undertaking: no such contract is enforceable against the Crown, whether to continue service, to pay for service, or to pay pension: *In re Tufnell* (1), *Cooper v. The Queen* (2), *Dunn v. The Queen* (3). See also *Shenton v. Smith* (4) and *Gould v. Stuart* (5), which were decisions of the Privy Council on appeal from the Colonies. The East India Company enjoyed the same immunity from suits in respect of contracts of service: *Gibson v. East India Company* (6), *Ex parte Napier* (7). By virtue of 21 and 22 Vic. c. 106, ss. 65, 68, and 22 and 23 Vic. c. 41, s. 6, the Secretary of State for India is liable only to such suits as may have been instituted against the East India Company: *Grant v. Secretary of State for India* (8), *Nobin Chunder Dey v. The Secretary of State for India* (9), *Voss v. Secretary of State for India* (10), *Bellou*

(1) (1876) L. R. 3 Ch. D. 164.

(2) (1880) L. R. 14 Ch. D. 311.

(3) [1896] 1 Q. B. 116.

(4) [1895] A. C. 229.

(5) [1896] A. C. 575.

(6) (1839) 5 Bing. N. C. 262.

(7) (1852) 21 L. J. Q. B. 332.

(8) (1877) L. R. 2 C. P. D. 445.

(9) (1875) I. L. R. 1 Calc. 11.

(10) (1906) I. L. R. 33 Calc. 669.

v. *Secretary of State for India* (1). Section 4 of the Pensions Act, 1871, affords a complete bar to suits against the Government for the recovery of all pensions or grants of money.

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Mr. B. Chakravarti (with him *Mr. C. R. Dass* and *Mr. Lahiri*), for the plaintiff. Even in England the Crown is bound by its contract and a petition of right will lie for breach of contract by the Crown: *Thomas v. The Queen* (2), *Wind-sor and Annapolis Ry. Co. v. The Queen and the Western Counties Ry. Co.* (3). The Crown is bound by its contract of service except where the servant exercises delegated sovereign powers.

Neither the Secretary of State nor the East India Company has full sovereign powers, but assuming the Secretary of State does have such powers he is bound by 21 and 22 Vic. c. 106. The test is whether the contract was an act of State, or was such as could have been entered into by a private person in the course of a private undertaking. If it is the latter the Secretary of State is liable to an action: *Forrester v. Secretary of State for India in Council* (4), *P. & O. S. N. Co. v. Secretary of State for India* (5), *The Secretary of State for India v. Hari Bhangi* (6), *Jehangir M. Cursetji v. Secretary of State* (7), *Shivabhajan v. Secretary of State for India* (8), *Kinlock v. Secretary of State for India* (9). The Pensions Act of 1871 does not in any way militate against or interfere with 21 and 22 Vic. 106. It applies only to Government servants in the ordinary employment of the Government and to remuneration for ordinary services and not to such as are under a special contract of service for other than State purposes. In England a petition of right would lie for pension: *Wroth's case* (10). On the Pensions Act, see *Maharaval Mohansingji v. The Government of Bombay* (11). But it is

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| (1) Unreported. | (7) (1902) I. L. R. 27 Bom. 189. |
| (2) (1874) L. R. 10 Q. B. 31. | (8) (1904) I. L. R. 28 Bom. 315. |
| (3) (1886) L. R. 11 A. C. 607. | (9) (1882) L. R. 7 A. C. 619. |
| (4) (1871) L. R. I. A. Sup. Vol. 10. | (10) (1573) 2 Plow. 452. |
| (5) (1861) 5 Bom. H. C. Appx. 1. | (11) (1881) I. L. R. 5 Bom. 408; |
| (6) (1882) I. L. R. 5 Mad. 273. | L. R. 8 I. A. 47. |

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submitted the claim in suit was not for pension but for remuneration under a special contract. The cases cited on behalf of the defendant do not bear on the point and are distinguishable: *Vide* Halsbury's Laws of England, Vol. VII, p. 22 and Vol. X pp. 21 and 29, also Robertson's Civil Proceedings against the Crown, pp. 346, 354, 355.

STEPHEN J. This suit is brought by the plaintiff for a declaration that he is entitled to receive from the defendant payment of Rs. 300 a month for the rest of his life, and to recover from him a sum of Rs. 8,610 representing the balance of the sum that is due to him on the default of the defendant to pay him this amount since the 25th May 1902. The facts of the case are peculiar, and it is admitted that shortly they are as follows. In 1881 the plaintiff was acting as a schoolmaster in the employment of the Education Department of the Government of India at Darjeeling. In that year he was employed by the defendant to undertake a highly dangerous journey into Tibet and to make certain enquiries there, the result of which, if the expedition were successful, would be useful to the Government. The terms on which he was employed are contained in a document dated the 4th September 1881, signed by Mr. Cockerell, who was at that time Secretary to the Government of Bengal and was authorised to act in the matter for the defendant. That document begins: "The conditions upon which Babu Sarat Chandra Das, Deputy Inspector of Schools (at) Darjeeling will proceed to Tibet are the following." His duties are then set out and are, briefly, to go to Lhasa, see as much of the country as he can, and return to India in about a year if he can manage to do so. He is to receive articles to the value of Rs. 5,000 wherewith to defray his expenses. Paragraph 3 of the document then goes on: "From the 1st September 1881, his pay will be raised during good behaviour to Rs. 300 a month" and arrangements are made, with which we are not concerned, as to how Rs. 300 a month was to be paid to him during his absence,

and what was to happen in case of his death before his return to British India. He carried out his instructions and returned to Darjeeling on the 27th December 1882. The case made in the plaint is that from that date he served the Government of India on deputation, being nominally in the Education Service, though he repeatedly applied to the Government to be treated as actually a member of the Education Service, so as to become entitled to the emoluments and promotion to be expected by a man in that position. This state of things continued till September 1902, when, in spite of his protests, he was compelled to revert to the Education Service as a preliminary to making him retire as a member thereof. He was so retired, apparently in 1904, though this is not stated in the plaint, after having been placed on furlough in February 1902. He continued to draw Rs. 300 a month from the beginning to the 25th May 1903, since when he has received only Rs. 150 a month.

The defendant now argues that the plaint discloses no cause of action and that the suit must be dismissed accordingly. His case is that the plaintiff claims the Rs. 300 a month either as pension or pay. If he claims it as pension he is met by section 4 of the Pensions Act, 1871, which provides that "except as hereinafter provided no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right which for such pension or grant may have been substituted."

If he claims it as pay the defendant has a right to dismiss him at pleasure, consequently he may dismiss him on such terms as he sees fit. Further, in England the Crown is not bound by a contract of service; it can dismiss its servants at will, and is not bound to pay salary, pension or other remuneration for any services rendered either past or future: and the East India Company was, and consequently the Secretary of State now is, in the same position.

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To this the plaintiff replies that the Crown in England is bound by contracts of service as a private individual would be, except that where the contract enables the servant to exercise delegated sovereign powers the Crown may dismiss him at pleasure. Even though a public servant is liable to be dismissed at pleasure, yet if he is not dismissed during his full service he is entitled in England to enforce his rights under the contract by a petition of right. In India the East India Company could, and the Secretary of State can, enter into contracts by which they are bound, provided the contract is one which could be entered into by a private individual, and the contract does not purport to be entered into in the exercise of sovereign rights. In India the Secretary of State is legally bound by such contracts by force of 21 and 22 Vict. ch. 106, section 65; and the Pensions Act does not impair the contractor's rights, and does not in terms apply to this case.

In these circumstances the first thing I have to decide is whether the case is governed by section 4 of the Pensions Act; that is whether on the plaint as I have described it the plaintiff is claiming Rs. 300 a month as pension in the terms of that section.

The defendant's case is he is doing so because the opening words of the plaint show that he was in the employment of the defendant at the time of the contract, and paragraph 10, where he sets out what subsequently happened to him, shows that he never left that service till he was retired, but on the contrary asked to be replaced in his former branch of it whereby his prospects would have been materially improved, if, that is, his re-instatement in the Education Service had taken place early enough to enable him to secure promotion. The plaintiff served the defendant continuously till 1902 or 1904; any payment made after his services had ceased must therefore be taken as made in consideration of that service, and is, therefore, a pension in the most usual sense of that word, and any claim to it is a claim to a pension.

To this the plaintiff replies in argument that the service of the plaintiff in Tibet must be taken as wholly independent of

any other service that he may at any time have rendered to the Government. An expedition of the character of that undertaken by the plaintiff is so widely different from the ordinary duties of a member of the Education Service that it must be taken on the same footing as if it had been rendered by a stranger, and as soon as it was concluded safely and according to the terms of the defendant's instructions, the consideration was earned, however it was to be paid and whatever might happen afterwards. He was not bound to continue to serve the Government and the present claim is not one for pension, but for an annuity which may for present purposes be taken as representing a lump sum of money payable at the end of the expedition.

The plaintiff urges that the term "during good behaviour" used in paragraph 3 of the document of 4th September 1881, is equivalent to "for life," and as far as the present argument is concerned the defendant admits that this must be taken to be so, as it would have this effect in the absence of any proof of want of good behaviour, an issue which it would be for the defendant to prove and which of course it is not now open to me to consider.

It may be fair to both parties to point out that the defendant has pleaded that the plaintiff's actions and conduct have not been such as to fulfil the condition of good behaviour; but this plea was withdrawn at the commencement of the hearing.

On considering the arguments that have been addressed to me on this part of the case, which turns of course merely on the meaning I attach to the plaint including the document of 4th September 1881, I find that those of the defendant must prevail. The terms of the document are "that his (the plaintiff's) pay will be raised," which according to the defendant's contention I must read as equivalent to "he shall receive." During his absence in Tibet he is to receive salary, and I cannot but regard this as a payment of the same kind as that which he had already been receiving in the Education Service. According to his own case he was in the service

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of the Government of India on deputation for some twenty years after his return from Tibet, and repeatedly asked to be treated as a member of his former branch of Government service, which seems to me to go to show that he is treating the whole of his service under Government as one service, and that he can not separate the expedition from the service before and after it took place. He reverted to the Education Service in 1902, and was retired in 1904, but as he seems not to have acquiesced in what was then done, and had, I suppose, no choice in the matter, I do not think these facts are of much importance.

The conclusion seems to me inevitable that he must be taken to have been in Government service during the whole of the time I have mentioned: and that anything payable to him after the termination of that service is in the nature of what is commonly understood as a pension. This being so, I am unable to avoid the conclusion that any payment which the defendant is bound by the terms of the document of 4th September 1881, to make to the plaintiff after the termination of his service is a pension as it is ordinarily understood. The plaintiff has attempted to argue that it is not a pension within the terms of the section 4 of the Pension Act; but the terms of that enactment relating to pensions, seem to me amply to cover the present case, though they have been carefully framed so as to cover a great many others.

The plaintiff's suit must accordingly fail on this point and it is unnecessary that I should express any opinion on how far the numerous authorities dealing with the liability of the Crown and the Secretary of State to be sued on contracts of service apply to the present case.

The suit is accordingly dismissed.

Suit dismissed

Attorneys for the plaintiff: *N. N. Sen & Co.*

Attorneys for the defendant: *Eggar.*

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

RAM SARAN PATHAK

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RAGHU NANDAN GIR.*

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Offerings to Deity—Dispute concerning the possession of a temple and its offerings—Offerings not “profits” arising out of a temple—Jurisdiction of Magistrate—Apportionment of the offerings—Criminal Procedure Code (Act V of 1898) s. 145.

Section 145 of the Criminal Procedure Code includes within its scope a dispute concerning the actual possession of a temple and the land on which it stands, but not one relating to the right to, and apportionment of, the offerings given by the worshippers.

Such offerings are not “profits” arising out of the temple within the meaning of s. 145 (2).

An order made under s. 145 declaring a party entitled to the actual possession of a temple and its offerings is, therefore, *intra vires* as to the temple, but not as to the offerings.

Guiram Ghosal v. Lal Behari Das (1) referred to.

THE facts of the case appear to be as follows: There is in the city of Gaya a temple called the Pita Maheswar in which the principal deity is an idol of the god Shiva open to the public for worship. The temple was originally the private property of Sita Dai, who made a gift of it to Chaman Lal, Gayawalla, in 1852. After the latter's death in 1896, his grandson, Kashi Lal, came into possession of his estate, and executed several mortgages of the temple and its offerings to various persons down to 1907. After a previous mortgage, Kashi Lal conveyed his rights in the temple with the offerings to Raghu Nandan Gir by a *kobala*, dated the 15th April 1909. Disputes then arose between the petitioner and Raghu Nandan regarding the possession of the temple and the management of its offerings, resulting in an order under s. 145

* Criminal Revision, No. 1419 of 1910, against the order of H. B. Sahay, Deputy Magistrate of Gaya, dated Sept. 23, 1910.

(1) (1910) I. L. R. 37 Cal. 578.

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of the Criminal Procedure Code, passed on the 1st December 1909, which was set aside by the High Court on the 29th April 1910. On the 23rd May 1910, the petitioner made an application to the Magistrate in charge to bind down Raghu Nandan under s. 107, or to take proceedings under s. 145 of the Code. The latter course was adopted, and a proceeding was instituted, on the 30th May, between the petitioner, as the first, and Raghu Nandan, as the second, party. The petitioner claimed to be in possession of the temple as the sole *pujari* by hereditary descent, and to be entitled to one-fourth of the offerings for his personal use, the remainder being according to him, entrusted to Chaman Lal, and since his death to Kashi Lal, for the purposes of the *rag* and *bhog* of the idol. At a later stage of the case the landlord of the lands in the *mahalla*, in which the temple was situated, was added as a party. The Magistrate found by his order, dated the 23rd September 1910, that the second party, as the vendee of Kashi Lal, was the proprietor and in actual possession of the temple and its offerings since his purchase, and was entitled to the same until eviction in due course of law, that the first party, as *pujari*, was a servant of the proprietor of the temple, and had no *locus standi* in the proceeding, and that the third party had no claim whatever in the matter.

The first party then moved the High Court and obtained the present Rule.

Mr. K. N. Chaudhuri, Babu Hari Bhusan Mookerjee and Babu Prakash Chandra Sarkar, for the petitioners.

Babu Manmatha Nath Mookerjee, for the opposite party.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate of Gaya to shew cause why the proceedings against the petitioner under section 145 of the Criminal Procedure Code should not be quashed on the ground that they are without jurisdiction and in direct contravention of the ruling in *Guiram Ghosal v. Lal Behari Das* (1).

(1) (1910) I. L. R. 37 Calc. 578.

It has been pointed out to us by the learned vakil who appears to shew cause, and very properly pointed out, that, so far as the declaration of possession of the temple and the land on which it stands in favour of Raghu Nandan Gir goes, that declaration has been made with full jurisdiction, and is not in contravention of any ruling of this Court.

The only question which arises in this case is whether the declaration that Raghu Nandan Gir is in possession of the offerings is an order made with jurisdiction or not. It is contended that the offerings made in a temple are of the same nature as the rents and profits arising out of lands. Now section 145, clause (2), says: "For the purpose of this section the expression 'land or water' includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property." It appears clear to us that the offerings given by worshippers for the worship of any deity are not profits arising out of a building. If the deity be in a cave or under a tree, as it originally was in years gone by, the offerings would accrue in exactly the same manner. The offerings arise out of the deity, irrespective of the building or the land upon which he may happen to dwell. To hold otherwise would be to allow the Criminal Courts to interfere with the customary laws of this country. There are certain rules differing in various sects and in various districts as to the apportionment of the offerings between the ground landlord, the actual holder of the temple, the middleman, and the *pujari*, and the sums which are devoted to the up-keep of the temple. Now it is quite impossible for the Criminal Courts to go into these matters, and it is quite impossible to say that the whole of these offerings belongs to the ground landlord, middleman, *pujari* or to the endowment. The matter, which depends entirely upon custom and sometimes upon an ancient grant or other documents, can only be adjudicated upon by a competent Civil Court. And that was the view which appears to have guided the Judges who decided the case of *Guiram Ghosal v. Lal Behari Das* (1). They say that "considering also the scope of section 145 of the Criminal Procedure Code.

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we think that the present dispute (which was the right to perform the duties of a *pujari*) is certainly not one which was intended that section 147 should cover."

The argument that this case was under section 147 of the Criminal Procedure Code, and, therefore, does not affect the present case which is one under section 145 of the Criminal Procedure Code, does not help the petitioner, because a case under section 147 of the Criminal Procedure Code is to be decided by the same procedure and on the same principles as a case under section 145 of the Criminal Procedure Code. And as the Judges say, "it may be that it is impossible to perform the duties of a *pujari* without entering upon the land upon which the temple is built."

But when it comes to the question of the offerings being disputed and not the house or the land, it is clear that the dispute is about moveable property; and it is now settled law that section 145 of the Criminal Procedure Code has no concern with moveable property.

We, therefore, consider that the order, so far as it affects the offerings of the temple, was made without jurisdiction, and that portion of the lower Court must be discharged, the Rule being made absolute to that extent, and to that extent only.

E. H. M.

Rule absolute in part.

APPELLATE CIVIL.

Before Mr. Justice Woodroffe and Mr. Justice Carnduff.

RAGHUNATH SINGH

v.

ABDHUT SINGH.*

1911

Jan. 9.

Appeal—Jurisdiction—Sambalpur—Appeal against decree or order passed by Deputy Commissioner acting as a Civil Court—Central Provinces Land Revenue Act (XVIII of 1881), as amended by Act IV, B.C., of 1906, ss. 136 II (1) and 22, cl. (b)—Bengal, North Western and Assam Civil Courts Act (XII of 1887)—Second Appeal, if it lies to High Court when original appeal decided by the wrong Court.

Section 136 H (i), introduced into the Central Provinces Land-revenue Act of 1881, by Act XVI of 1889, qualifies s. 22, cl. (b) of the original Act, with the result that under it, read with s. 3 of the Sambalpur Civil Courts Act, 1906 (Ben. Act IV of 1906), an appeal against a decree or order passed by the Deputy Commissioner acting as Civil Court lies to the District Judge.

Where, in such a case, an appeal was wrongly preferred before the Commissioner, no second appeal from the Commissioner's decision lies to the High Court.

SECOND APPEAL by the defendant.

This was originally an application for partition filed in the Court of the Sub-Divisional Officer of Sambalpur, who was vested with the powers of a Deputy Commissioner under the Central Provinces Land-revenue Act, 1881. The co-sharer of the applicant opposed the application, contending, *inter alia*, that the Court had no jurisdiction to entertain the application, the value of the subject-matter of dispute being over Rs. 1,000, and that the estate was impartible. The Court of first instance over-ruled the objections, and ordered partition. The non-applicant thereupon appealed to the Commissioner of Cuttack. The appeal was dismissed. He then preferred this second appeal.

*Appeal from Appellate Decree, No. 1284 of 1910, against the decree of E. V. Levinge, Commissioner of Cuttack, dated Feb. 23, 1910, affirming the decree of Krinaji Ananta Shirale, Sub-Divisional Officer of Sambalpur, dated Dec. 18, 1909.

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Babu Sateesh Chandra Ghose (Babu Anilendra Nath Ray Chowdhury with him), for the respondent, raised a preliminary objection to the hearing of the second appeal on the ground that no second appeal lay to the High Court. If the appeal, in the first instance, was preferred before the District Judge, as it should have been, a second appeal would have lain to this Court. The appellant has, however, lost his remedy by preferring an appeal before the Commissioner. It is true that s. 22, cl. (b), provides that an appeal lies to the Commissioner. See, however, s. 136 H (1). The latter section read with ss. 4, 7, 8 and 17, cl. (2), of the Central Provinces Civil Courts Act (XVI of 1885) makes it clear that the appeal would lie to the District Court. The "Commissioner" should now be called the "Divisional Judge." Sections 3 to 10 of the Central Provinces Civil Courts Act (II of 1904) enumerate the different classes of Courts and their respective functions. Read section 3 of the last-mentioned Act. Also Schedule D, Part II, VI (b) of the Bengal and Assam Laws Act (VII of 1905), and *Calcutta Gazette*, 18th October 1905, Part I, p. 1804. The District Judge of Cuttack is the Divisional Judge. A Second Appeal lies to the High Court against a decree or order passed by the District Judge in appeal: *Jaffar Hussen v. Abdul Kadar* (1), *Loknath Dube v. Bissessar Dube* (2), *Seth Birdhiehand v. Kaim Bi* (3).

Maulvi Shamsul Huda (Mr. D. N. Sarkar with him), for the appellant. The appeal was rightly preferred before the Commissioner. The Second Appeal therefore lies to the High Court. The law regulating the Civil Courts in Sambalpur, that is now in force, is Bengal Act IV of 1906. Section 21 of Act XII of 1887 speaks of Munsifs and Subordinate Judges only, and not of Commissioners or Deputy Commissioners. It makes no provision for appeals from decrees or orders passed by the Deputy Commissioner. There is no provision that appeal would lie to the District Judge. The Deputy Commissioner might not have jurisdiction to decide civil matters after

(1) (1902) 15 C. P. L. R. 81. (2) (1902) 15 C. P. L. R. 153.

(3) (1903) 17 C. P. L. R. 5.

the passing of Bengal Act IV of 1906, but the appeal properly lay to the Commissioner. The Deputy Commissioner is not subordinate to the District Judge.

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WOODROFFE J. The law in force at the institution of these proceedings was the Central Provinces Land Revenue Act (XVIII of 1881) and the Bengal Civil Courts Act of 1887, inasmuch as Act II of 1904 was repealed by Act IV of 1906, so far as it referred to Sambalpur. No doubt section 22 (b) of Act XVIII of 1881 provides that, when a decision or order is passed by the Deputy Commissioner, an appeal lies to the Commissioner. But, by an amendment introduced in that Act by section 136H (1), "All decrees and orders passed by the Deputy Commissioner . . . shall be held to be decrees and orders of a Court of Civil Judicature, and shall be open to appeal as if passed by the Court of the Deputy Commissioner, acting as a Court of Civil Judicature of first instance, under the Central Provinces Civil Courts Act of 1885," and to that extent that section, 136 H. (1), now qualifies section 22, clause (b), whatever may have been the case when that section, 136 H. (1), was first enacted. For we must construe the words "Central Provinces Civil Courts Act of 1855," occurring in section 136 H. (1), as referring to the Bengal Civil Courts Act. If the decree or order was passed by the Deputy Commissioner acting as a Court of Civil Judicature, then, applying the Bengal Civil Courts Act, the appeal lay to the District Judge.

In my opinion we are concerned in this case with the interpretation to be placed upon section 136 H (1). But, in any case, section 136 (1), which was framed at a time when the Commissioner was a Court of Appeal, must be read consistently with the provisions of section 136 H (1), as they have been affected by Act IV of 1906. The latter Act had the effect of repealing Act II of 1904, and of introducing the operation of the Bengal Civil Courts Act. As the appeal, therefore, lay to the District Judge, and, in fact, the appeal was taken to the

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Commissioner, there is, in my opinion, no second appeal from the Commissioner's decision to us.

The appeal must accordingly be dismissed, with costs.

The Rule *nisi*, which was one for stay of execution of the decree pending the hearing of the appeal, has come to an end with the hearing and dismissal of the appeal, and is discharged, with costs.

CARNDUFF J. I am of the same opinion. It seems to me to be clear that, under section 136 H of the Central Provinces Land-revenue Act, 1881 (India Act XVIII of 1881, as amended expressly by India Act XVI of 1889 and impliedly by Bengal Act IV of 1906), the appeal in this case lay to the District Judge, and was wrongly preferred before the Commissioner, by whom it was dismissed. That being so, the appellant has lost his remedy, and this second appeal must be dismissed.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

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 Jan. 13

KUMUD NATH ROY CHOWDHURY

v.

JOTINDRA NATH CHOWDHURY.*

Substituted Service—Civil Procedure Code (Act V of 1908), o. IX, r. 13; o. V, r. 17—Ex parte decree—Original Court, jurisdiction of, to set aside an ex parte decree, while an appeal is pending—"Reside," meaning of—Limitation Acts (XV of 1877), Sch. II, Art. 164 and Act IX of 1908, Sch. I, Art. 64—Knowledge of the decree.

The term "residence" is not identical with "ownership." In o. V, rules 9 and 17 of the Code of Civil Procedure, 1908, it means the place where a person eats, drinks and sleeps, or where his family or servants eat, drink and sleep.

Under o. V, rule 17, a substituted service can be justified only when it is shown that proper efforts were made to find the defendant.

* Appeal from Original Order, No. 186 of 1910, against the order of Bhagabati Charan Kundu, Subordinate Judge of 24-Perganahs, dated April 20, 1910.

Where a defendant was not found in his ancestral family house, and there was no one present upon whom a summons could be served, (in fact he was working in a different district and living there for some years), a substituted service by affixing a copy of the summons at the outer door of the family house was not justified under the law.

An Original Court can entertain an application to set aside an *ex parte* decree though an appeal by the contesting defendants is pending in the Appellate Court.

Sarat Chandra Dhal v. Damodar Manna (1) followed.

The period of limitation under Art. 164 of Sch. I of the Limitation Act (IX of 1908) runs from the date when the defendant has knowledge of the particular decree which is sought to be set aside.

APPEAL by the petitioner, Kumud Nath Roy Chowdhury.

On the 27th September, 1907, the opposite party brought a suit upon a mortgage bond against the mortgagors, one Bhabanath Roy Chowdhury and his four brothers. Three of the brothers entered appearance and contested the suit. On the 24th July, 1908, a mortgage decree upon contest was passed against the defendants, who entered appearance, and an *ex parte* decree against the other two defendants. On the 17th of April, 1909, the defendant Ajit Nath Roy Chowdhury made an application to set aside the *ex parte* decree passed against him, and on the 26th June, 1909, a similar application was made by Kumud Nath Roy Chowdhury. Ajit Nath stated that he did not know anything about the suit and the decree, that only two days ago he was informed of it by his *karpardaz*; and Kumud Nath's allegation was that on the 1st of June, 1909, there was a proposal of an amicable settlement of the decree, and he was required to send a vakalatnamah from Berhampore, where he had been residing for the last ten years, and thus came to know of the decree.

It appeared that summonses were served at Taki in the Basirhat Sub-division, in the paternal house of the defendants, at the time when defendants were not residing there, and their agents were also not found there. The copies of the summonses were therefore affixed at the outer door of the ancestral dwelling-house.

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The learned Subordinate Judge dismissed both the applications holding that they were barred by limitation, although he held that summonses were not duly served upon the defendants.

Against this decision one of the defendants, Kumud Nath Roy Chowdhury, appealed to the High Court.

Babu Sarat Chandra Ghose (with him *Babu Lalit Mohan Mukherjee*), for the appellant. The learned Subordinate Judge having found that no summons was duly served upon the defendant, ought to have set aside the *ex parte* decree against him. He was wrong in holding that the application was barred by limitation. The appellant was serving at Murshidabad for about ten years, and there he was residing. The learned Judge upon the evidence ought not to have held that the appellant had knowledge of the decree before one month of the date of the application of setting aside the decree. Article 164 of Schedule II of the Limitation Act (XV of 1877) applies to the case. And the right to make such application was not affected by the Limitation Act of 1908.

Babu Sarat Chandra Roy Chowdhury (with him *Babu Lalit Mohan Banerji*), for the respondent. The Court below was right in holding that the application was barred by limitation. The five brothers being joint, and decree having been passed against three of them upon contest, it must be presumed that the other two brothers against whom the decree was passed *ex parte* were aware of the decree. The application was made under order IX, rule 13, of the new Code of Civil Procedure after the new Limitation Act of 1908 came into force, and therefore Article 164 of Schedule I of the Limitation Act would apply to the case. The application of the petitioner must fail, unless he could prove satisfactorily that he came to know of the suit and the decree within one month of the date of the application. He failed to do so. The contesting defendants having filed an appeal against the decree to the High Court, the original Court had no jurisdiction to set aside the *ex parte* decree: see order XLI, rule 4, and

the cases of *Dhonai Sardar v. Tarak Nath Chowdhury* (1) and *Sankara Bhatta v. Subraya Bhatta* (2). The service of summons in the family dwelling-house of the petitioner where they had their servants was proper service.

Cur. adv. vult.

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MOOKERJEE AND TEUNON JJ. This appeal is directed against an order of refusal of the Court below to set aside an *ex parte* decree. On the 27th September, 1907, the present respondent, who had taken an assignment of a mortgage bond, commenced an action to enforce the security against the mortgagors, who formed a family of five brothers. Of these, the first three entered appearance in the suit and disputed the claim of the plaintiff. There was no appearance on behalf of the other two defendants. On the 24th July, 1908, a decree upon contest was made against the first three defendants, and an *ex parte* decree against the other two defendants. On the 26th June, 1909, two applications were made, one by each of these defendants to set aside the *ex parte* decree. On the 20th April, 1910, the Subordinate Judge dismissed both the applications. He held that the summons was not duly served, but that as the applicants knew about the suit, when it was actively defended by their eldest brother, the applications were barred by limitation. One of the brothers alone, by name Kumud Nath Roy Chowdhury, has preferred this appeal, and on his behalf the decision of the Subordinate Judge has been assailed on two grounds, namely, *first*, that the period of limitation applicable to the case is that provided by article 164 of the Limitation Act of 1887, which was in force when the *ex parte* decree was made, and that as no steps have yet been taken to execute any process for enforcement of the judgment, no question of limitation arises; and, *secondly*, that even if article 164 of the Limitation Act of 1908, which came into force after the *ex parte* decree had been made, and before the application to set it aside had been presented, he held to be applicable, there

(1) (1910) 12 C. L. J. 53.

(2) (1907) I. L. R. 30 Mad. 535.

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is no evidence to show that the petitioner had knowledge of the *ex parte* decree more than thirty days before the application was made. These points have been strenuously contested on behalf of the respondent decree-holder, and it has further been urged on his behalf, *first*, that the summons was duly served upon the petitioner, and, *secondly*, that as an appeal had been presented by the contesting defendants against the decree, the Subordinate Judge had no jurisdiction thereafter to entertain any application to set aside that decree at the instance of even the defendant against whom it had been made *ex parte*. The questions, therefore, which emerge for consideration from the arguments addressed to us on both sides, are, *first*, was summons duly served upon the appellant, the petitioner in the Court below? *Secondly*, had the Court below jurisdiction to entertain the application at the instance of the appellant after an appeal had been preferred against the decree by the contesting defendants? And, *thirdly*, was the application barred by limitation?

In so far as the first of these grounds is concerned, under rule 13 of order IX of the Civil Procedure Code of 1908, the burden is upon the petitioner to satisfy the Court that the summons was not duly served upon him. Now rule 9 of order V provides, that where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction, who is empowered to accept service of the summons, the summons shall be delivered to the proper officer to be served by him. Rule 12 next provides that, wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. Rule 17 provides the procedure to be followed when the defendant refuses to accept service or cannot be found, and lays down that when the serving officer cannot find the defendant, he shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. Now, in the case before us, the sum-

mons was taken for service to the ancestral family house of the defendant in Taki within the jurisdiction of the Court of the Subordinate Judge of the 24-Perganas. The defendant was not found in the house; there was no one present upon whom the notice could be served, nor had the defendant any agent empowered to accept service. As a matter of fact, the defendant is an overseer under the Maharaja of Cossimbazar, and since 1897, has lived at Murshidabd. He asserts—and there is no reason to distrust his testimony—that he has not been at Taki for five or six years. Under these circumstances, the summons was affixed to the outer door of the house at Taki, because, as the serving officer stated in his return, he found that all the rooms were locked up, and no one lived in the house at the time. The learned vakil for the respondent has contended that the summons was duly served under the provisions of the law, because as the house was owned by the defendant, he must be taken to have resided there; in other words, it has been argued that for the purposes of the service of summons, residence is identical with ownership. This position is manifestly untenable. The term “resides” is not defined in the Code, but in the Oxford Dictionary (vol. VIII, page 517), it is stated to mean “dwelling permanently or for a considerable time, to have one’s settled or usual abode, to live in or at a particular place.” Substantially the same definition was given by Mr. Justice Bayley in *R. v. North Curry* (1) when he observed as follows:—“What is the meaning of the word resides? I take it that, that word, where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks and sleeps, or where his family or servants eat, drink and sleep.” To the same effect is the observation of Mr. Justice Blackburn in *In re Oldham* (2) “A man’s residence is where he habitually sleeps.” The argument, however, that residence is convertible and identical with ownership, has sometimes been advanced, and it was expressly negatived by Gibson J., in *R. v.*

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(1) (1825) 4 B. & C. 953;

(2) (1870) 1 Om. & Ha. 158.

107 E. R. 1313.

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Fermanagh (1). It was ruled in this case that the residence of a man is primarily the dwelling and home where he is supposed usually to live and sleep; it may also include a man's business abode, the place where he is to be found daily, but it was added that it would be a manifest abuse of language, without warrant in any dictionary, law or usage, to describe a permanent absentee as resident in a place merely by virtue of ownership. This view was affirmed by Holmes L. J. in *R. v. Tyrone* (2). In the case before us, it is impossible, in our opinion, seriously to maintain the view that the defendant resided in his paternal house at Taki within the meaning of rules 9 and 17 of order V of the Code, although as a matter of fact, he lived permanently at Murshidabad where he was employed in the service of the Maharaja. We may further observe that the service in this case was made in contravention of rule 17, inasmuch as the copy of the summons was affixed on the outer door of the house before all due and reasonable diligence had been exercised to find out the defendant. In this respect, the new Code has altered the law, in that substituted service can be justified under the present rule only when it is shewn that proper efforts were made to find the defendant. It is fairly clear that the plaintiff knew that the defendant did not ordinarily reside in the ancestral house at Taki, and yet insisted upon the service of the summons at that place. We must, therefore, overrule the contention of the respondent and affirm the view taken by the Subordinate Judge, that the summons in this case was not duly served. It follows, consequently, that under order IX, rule 13, the petitioner is entitled to invite the Court to set aside the *ex parte* decree as against him.

In so far as the second point is concerned, it has been argued by the learned vakil for the respondent that the Subordinate Judge had no jurisdiction to entertain the application to set aside the *ex parte* decree, because the contesting defendants had preferred an appeal to this Court against the decree. In support of this view, he has placed reliance upon

(1) (1897) 2 I. R. 559, 564.

(2) (1901) 2 I. R. 497, 510.

the cases of *Dhonai Sardar v. Tarak Nath Chowdhury* (1) and *Sankara Bhatta v. Subraya Bhatta* (2). In answer to this argument, it has been contended on behalf of the appellant that the cases mentioned are distinguishable, inasmuch as the application to set aside the *ex parte* decree in these cases, was made to the Original Court after the decree had been affirmed on appeal, and that the case now before us is completely covered by the decision in *Sarat Chandra Dhal v. Damodar Manna* (3) which was affirmed on appeal under section 15 of the Letters Patent *Damodar Manna v. Sarat Chandra Dhal* (4). In our opinion, the objection by the respondent must be overruled. It is worthy of note, that this point was not urged in the Court below, and there is no legal evidence on the present record to show that an appeal against the decree has been preferred to this Court by the contesting defendants. We do not desire, however, to rest our decision upon what may be deemed a technical ground. We shall assume that the appeal was lodged in this Court on the 15th April, 1909, and though presented out of time, was directed to be registered, on the 7th May, 1909. That appeal, however, is still pending in this Court, and the decree of the Original Court is still in full force and operation; it has not been superseded by any decree on appeal or merged therein. Under these circumstances, it is difficult to appreciate how on principle the view can be maintained, that the jurisdiction of the Original Court to entertain an application to set aside the decree, in so far as it is *ex parte* has been taken away. It has been broadly contended, however, by the learned vakil for the respondent, upon the authority of expressions to be found in the judgments in *Dhanai Sardar v. Tarak Nath Chowdhury* (1), *Ramanadhan Chetti v. Narayanan Chetty* (5) and *Sankara Bhatta v. Subraya Bhatta* (2) that the immediate effect of the presentation of an appeal to a Superior Court against the decree of a Subordinate Court, is to destroy the jurisdiction of

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(1) (1910) 12 C. L. J. 53.

(3) (1908) 12 C. W. N. 885.

(2) (1907) I. L. R. 30 Mad. 535. (4) (1909) 13 C. W. N. 846.

(5) (1904) I. L. R. 27 Mad. 602.

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the latter Court to deal with the judgment in controversy in any way. We are not prepared to accept this proposition as well founded on principle, and it is, as a matter of fact, opposed to the decision of the House of Lords in *Mellish v. Richardson* (1) in which it was ruled, that where the Court would otherwise have the authority to amend the judgment, it may be done after an appeal has been taken. This view is entirely inconsistent with the theory that the mere presentation of an appeal puts it beyond the power of the Original Court to deal in any manner with the judgment under appeal. The position is obviously different after the adjudication of the appeal, when the original judgment has been superseded by the judgment of the Court of Appeal: *Brij Narain v. Tejbal* (2). The view we take has been adopted also in a long series of decisions in the American Courts, amongst which reference may be made to *Exp. Henderson* (3) and *Texas Railway Company v. Walker* (4). We must, therefore, adhere to the principle which underlies the decision of this Court in *Damodar Manna v. Sarat Chandra Dhal* (5) and overrule the contention of the respondent, that the Original Court could not entertain the application to set aside the *ex parte* decree presented by the appellant, merely because the contesting defendants had preferred an appeal to this Court.

In so far as the third point is concerned, it has been argued by the learned vakil for the appellant, that as soon as the *ex parte* decree was made against him, a right accrued to him to have it set aside within the period prescribed by the Limitation Act of 1877, and that such right was not affected by the Limitation Act of 1908. It has been argued, on the other hand, that the application to set aside the *ex parte* decree, presented as it was after the Limitation Act of 1908 had come into operation, attracted the operation of the provision of the new Act, and in support of this view, reliance has been placed upon the case of *Basiruddin Mandal v. Sonaula*

(1) (1832) 1 Cl. & Fin. 224;

36 R. R. 111.

(3) (1887) 4 Southern 284.

(4) (1905) 87 S. W. 194.

(2) (1910) I. L. R. 32 All. 295;

(5) (1909) 13 C. W. N. 846.

L. R. 37 I. A. 70.

Mandal (1). This latter decision, however, furnishes no authority in support of the contention of the respondent, and it may be observed that the head note to the report is entirely misleading. An examination of the judgment shews that the question of the applicability of the Act of 1908, was not decided. In the case before us also, the point need not be decided, because we have arrived at the conclusion, that whether the provisions of the Act of 1877 or of 1908 be held applicable, the application is not barred by limitation. The petitioner asserts that he first became aware of the *ex parte* decree on the 1st June, 1909, and made the application to set it aside on the 26th June following. The learned Subordinate Judge, however, has held, that as his brothers had knowledge of the *ex parte* decree, the inference may reasonably be drawn that he had a similar knowledge of it. We are unable to accept this conclusion as based on a correct appreciation of the evidence. As pointed out by Mr. Justice Davar in *Pundlick v. Vasant Rao* (2), the term "knowledge" in Article 164 of the Limitation Act of 1908, means a certain and clear perception of a fact, the fact being the decree in the suit; the expression "knowledge of the decree" means knowledge not of a decree but of the particular decree which is sought to be set aside. Now, in the case before us, there is no direct evidence on the record that the petitioner had knowledge of the decree before the 1st June, 1909. The circumstances, upon which reliance has been placed in support of the contrary view, are entirely inconclusive. As the petitioner asserts, the feelings between the brothers have not been of the very best and the eldest brother is said to have wasted their properties. The petitioner lives away from his brothers, and there is no tangible evidence to show that the latter communicated the fact of the decree to him. It has further been contended that as five thousand rupees was paid in partial satisfaction of the judgment-debt for which the brothers are jointly liable, the petitioner must have been aware of the decree, but the latter maintains that he has not paid any share of this sum. It further appears that the compromise attempted with the

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NATH
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(1) (1910) 15 C. W. N. 102.

(2) (1909) 11 Bom. L. R. 1296.

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decree-holder fell through and there is nothing to shew that the petitioner was aware of the details of the proposed settlement. It has finally been suggested that as notices were issued on the occasion when the decree was made absolute the petitioner must at that time have been apprised of the *ex parte* decree. It transpires, however, that the notice addressed to the petitioner was served in the ancestral house. Upon an examination, then, of all the circumstances of the case and of the evidence on the record as it stands, we find it impossible to maintain the view of the Subordinate Judge that the application is barred by limitation.

The result, therefore, is that this appeal must be allowed, the order of the Subordinate Judge reversed, and the *ex parte* decree set aside as against the appellant. The appellant is entitled to his costs both here and in the Court below, as on the face of the proceedings it is manifest that the plaintiff proceeded with the trial of the suit with full knowledge that the summons addressed to the defendant had not been duly served.

The question next arises, what is the effect of this order upon the decree so far as the other defendants are concerned. The proviso to rule 13 of order IX lays down that where the decree is of such a nature that it cannot be set aside as against the defendant only against whom it has been made *ex parte*, it may be set aside as against all or any of the other defendants also. We are unable, however, to deal with this matter at the present stage, because the other defendants have not been made parties to this proceeding. But it is desirable that the question should be decided before the suit is re-heard as against the appellant, because if the point is left open for controversy, it may obviously lead to grave complications. We, therefore, direct that a notice be issued upon the other defendants-mortgagors so as to enable them to state their objections, if any, to an order in terms of the proviso to rule 13 of order IX. As soon as they have been afforded an opportunity to be heard in this matter, we shall make a supplementary order in that behalf.

[The entire decree was subsequently set aside.—*Ed.*]

s. c. g.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Stephen.

JUMNA DASS

v.

HARCHARAN DASS.*

1911

Jan. 16.

Injunction—Jurisdiction—Restraint of proceedings in Subordinate Court, outside the jurisdiction of High Court—Injunction in personam.

The High Court can restrain proceedings in a Court outside its jurisdiction only if the party sought to be restrained is within its jurisdiction, and it is not sufficient that the party should have property within the jurisdiction.

Vulcan Iron Works v. Bishumbhur Prosad (1) followed.

The Carron Iron Co. v. Maclaren (2) referred to.

Mungle Chand v. Gopal Ram (3) not followed.

THIS was a rule obtained by the plaintiffs calling upon the defendant to shew cause why an injunction should not be granted against him restraining him, pending the hearing of this suit, from further proceeding with a suit instituted by him against the plaintiffs in the Munsif's Court at Ludhiana.

The plaintiffs, who carried on business in Calcutta acted as the commission agents of the defendants who resided and carried on business at Ludhiana in the Punjab. It was alleged by the plaintiffs that at the defendant's request they purchased for him 100 tons of wheat for delivery in May and July 1910, payment to be made in Calcutta. A deposit of Rs. 600 was made by the defendant; the plaintiffs alleged the said deposit was made against the purchase.

The defendant failed to take delivery; and the plaintiffs after due notice resold the goods on the 14th November, 1910, and instituted this suit in December 1910, for the sum of Rs. 1,790, the loss suffered on resale, after crediting the defendant with the sum of Rs. 600 received as deposit. It appears that

* Motion in Original Civil Suit No. 1134 of 1910.

(1) (1908) I. L. R. 36 Calc. 233. (2) (1855) 5 H. L. C. 416.

(3) (1906) I. L. R. 34 Calc. 101.

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on the 15th November, 1910, the defendant had filed a suit at Ludhiana for the recovery of the sum of Rs. 600 with interest, and the suit was fixed for hearing on the 16th December, 1910.

The plaintiffs applied for a rule for a stay of proceedings, alleging that the deposit had been made as part of the transactions in suit, and that the defendant's suit had been instituted for the purpose of harassment. The rule was granted on the 9th December, 1910. It was contended by the defendant in reply that his claim was in no way connected with the transactions in suit, and that this Court had no jurisdiction to entertain the application or stay proceedings in the Ludhiana Court, inasmuch as he was neither resident nor carrying on business within the limits of the jurisdiction of the High Court at Calcutta.

Mr. B. C. Mitter, shewing cause on behalf of the defendant, contended that this Court had no jurisdiction to stay defendant's suit in the Court at Ludhiana inasmuch as the defendant was outside the jurisdiction: *Vulcan Iron Works v. Bishumbhur Prosad* (1).

Mr. Sinha (with him *Mr. Sircar*), in support of the rule. *Vulcan Iron Works v. Bishumbhur Prosad* (1) was wrongly decided on a misconception of *The Carron Iron Co. v. Maclaren* (2). As admittedly there is the deposit of Rs. 600 belonging to the defendant, within the jurisdiction of this Court, an injunction can issue restraining the defendant from proceeding with his suit in the Ludhiana Court: *Mungle Chand v. Gopal Ram* (3).

Cur. adv. vult.

STEPHEN J. The petitioner in this matter is a commission agent who bought certain goods on behalf of the defendant. His case is that the defendant refused to reimburse him for the expenses he had incurred and that events occurred which justified him in reselling the goods on behalf of the

(1) (1908) I. L. R. 36 Calc. 233. (2) (1855) 5 H. L. C. 416.
(3) (1906) I. L. R. 34 Calc. 101.

defendant at a less price than he had paid for them. Before the re-sale the defendant paid him Rs. 600 as a deposit in respect of the expenses he had incurred on behalf of the defendant. He now sues the defendant for the loss incurred on the re-sale of the goods allowing for the Rs. 600 he has received. The defendant brought a suit at Ludhiana for a return of Rs. 600 before the institution of the present suit. The plaintiff has obtained a rule on the defendant calling on him to show cause why he should not be restrained from proceeding with his suit in Ludhiana, and the two suits are so far concerned with the same subject matter, that were the Ludhiana suit brought in a Court subordinate to this Court, it would certainly be stayed. The defendant, however, shows cause by contending that this Court has no jurisdiction to issue an injunction on him, as he is not resident in Bengal. To this the plaintiff replies that the defendant has property within the jurisdiction, namely, the Rs. 600 deposit and that this gives this Court jurisdiction over him. I cannot, however, consider that this argument is well founded in point of law. In *Vulcan Iron Works v. Bishumbhur Prosad* (1), Fletcher J. after referring to *The Carron Iron Co. v. Maclaren* (2), comes to the conclusion that a Court of Equity can only restrain a person from proceeding with a suit in a Foreign Court, if he is within the jurisdiction of the Court. It has been sought to show that this conclusion was not properly deduced from the authority referred to on the ground that that case was decided on the merits of the case, and that if the Court that is asked to issue an injunction can make any order that would affect the person whom it is sought to enjoin, if, as is said, the Court can reach him by attaching or sequestering his property, it has jurisdiction to issue an injunction. I do not consider that this is so. The Court in the *Carron Iron Co. v. Maclaren* (2), proceeded not on the particular merits of the case but on the general rule that a person living entirely under a foreign jurisdiction must be left to obtain such relief as his own Courts may afford, and

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(1) (1908) I. L. R. 36 Calc. 233. (2) (1855) 5 H. L.C. 416.

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that being so, the case is an authority for the proposition put forward by Fletcher J. Lord Brougham's judgment seems to me quite inconsistent with any other view. I agree with Fletcher J. in the view he takes of the decision of this Court in *Mungle Chand v. Gopal Ram* (1).

The petition therefore fails on a point of law and I need not determine the question whether the defendant has any property within the jurisdiction, as the question does not arise. But I may say that the term property would have to be extended to very wide limits to embrace the Rs. 600 that the plaintiff has received and has applied to his own purposes.

The rule is therefore discharged with costs.

Rule discharged.

Attorney for the plaintiffs: *C. C. Bose.*

Attorneys for the defendant: *Manuel & Agarwalla.*

J. C.

(1) (1906) I. L. R. 34 Calc. 101.

APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1911
Feb. 7.

BHONA

v.

EMPEROR.*

Previous Convictions, evidence of—Belonging to a Gang of Thieves—Habit—Evidence of habit—Admissibility of evidence of previous convictions of offences against property and of bad livelihood—Penal Code (Act XLV of 1860) s. 401.

Where the other evidence in a case under s. 401 of the Penal Code establishes association for the purpose of habitually committing theft, evidence of previous convictions of offences against property and of bad livelihood is admissible to prove habit; and for this purpose convictions of bad livelihood are more cogent than those of isolated thefts.

* Application for admission of Appeal, No. 5 of 1911, against the order of W. S. Coutts, Additional Sessions Judge of Dacca, dated Dec. 9, 1910.

Empress v. Naba Kumar Patnaik (1), *Meher Ali Sarkar v. Emperor* (Cr. App. 742 of 1900 decided 20th March, 1901, by Prinsep and Hill JJ.) (2), *Madhu Dhari v. Emperor* (Cr. App. 582 of 1905, decided 26th July, 1905, by Rampini and Mookerjee JJ.) (3), *Khanta Karwal v. Emperor* (Cr. App. 78 of 1909, decided 28th January, 1909, by Holmwood and Ryves JJ.) (4), *Gobardhan v. Emperor* (Cr. App. 958 of 1910, decided, 21st November, 1910, by Holmwood and Fletcher JJ.) (5) referred to.

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Mankura Pasi v. Queen-Empress (6) doubted and explained.

THE appellants were tried before the Additional Sessions Judge of Dacca and a jury on a charge under s. 401 of the Penal Code, and convicted and sentenced thereunder, on the 10th December, 1910, to various terms of imprisonment. They filed an appeal from jail which was referred by the Judges hearing the undefended cases in Chambers to the Criminal Bench composed of Holmwood and Sharfuddin JJ.

It appeared from the first information filed in the case, on 1st March, 1910, that in 1890 the existence of a gang was, from the frequent occurrence of thefts in several villages, suspected and some ineffectual steps taken in the matter. In 1904 a gang case was contemplated but dropped. In September, 1909, the investigation was taken up again and one Fazul Sheik and two others were arrested. The former confessed to a Magistrate that in company with several of the present appellants and others he had been for the last 19 or 20 years concerned in 25 thefts and burglaries. Further police inquiries followed and in the course of them additional information was obtained, and the present appellants were sent up for trial, Fazul being made an approver. The evidence for the prosecution consisted (i) of the testimony of the approver, who deposed to the existence of a gang formed for the purpose of committing thefts, the actual participation of several of the accused in specific instances, and meetings convened to arrange about the commission of thefts at which some of the accused were present; (ii) evidence of association generally or at specific times and in particular circumstances, in the houses

(1) (1897) 1 C. W. N. 146.

(2) Unreported.

(3) Unreported.

(4) Unreported.

(5) Unreported.

(6) (1899) I. L. R. 27 Calc. 189.

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of some of the accused, at *hâts*, on the road, and in boats, from batches of two to ten or twelve, the same persons not being found together on each occasion; and (iii) evidence of previous convictions of theft and receiving stolen property, or of being bound down under ss. 109 and 110 of the Criminal Procedure Code during the period of the existence of the gang.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.
No one for the appellants.

HOLMWOOD AND SHARFUDDIN JJ. This is a jail appeal in a gang case, under section 401 of the Indian Penal Code, which before admission was sent to us by one of the Benches constituted to try undefended appeals in Chambers for argument on the point whether, having regard to the decision in the case of *Mankura Pasi v. Queen Empress* (1), evidence of previous convictions for offences against property and for bad livelihood are admissible in gang cases. We have heard the learned Deputy Legal Remembrancer for the Crown and have considered the reported and unreported cases. It was held by Prinsep and Hill JJ., in the case above cited that the character of the accused was not a fact in issue in the offence of belonging to a gang of persons associated for the purpose of habitually committing theft, and that, therefore, evidence of bad character or reputation of the accused is inadmissible for the purpose of proving the commission of that offence. The judgment is a doubtful one inasmuch as the case of *Empress v. Naba Kumar Patnaik* (2), where it was held that previous convictions for dacoity are relevant on a charge under section 400 of the Indian Penal Code, provided they are prior to the inception of the charge of belonging to a gang, is cited with approval.

Further, the decision went on the ultimate ground that even if convictions for theft and bad livelihood were admissible they were not sufficient in themselves for a conviction. "Such evidence," the Judges observe, rather curiously we venture

(1) (1899) I. L. R. 27 Calc. 139. (2) (1897) 1 C. W. N. 146.

to suggest, considering the statement set out in the judgment of what the evidence showed, "had in the case before them, formed the main, if not the only, ground on which the appellants had been convicted."

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But in cases where the other evidence has established association for purposes of habitually committing theft, evidence of previous convictions, whether for offences against property or for bad livelihood, has, we find, always been admitted, not as evidence of character, but as evidence of habit: and it would seem that of such evidence convictions for bad livelihood would be more cogent than those for isolated thefts.

Such evidence must of course be weighed. A single instance of theft, for instance, would count for little or nothing. There must be at least two or more cases against the same individual to show habit, but that the evidence of such convictions is inadmissible is clearly against the weight of authority in this court. We have already cited the case of *Empress v. Naba Kumar Patnaik* (1). We may proceed to cite four unreported cases that have been laid before us affirming the admissibility of such evidence. The first is a judgment of the same two learned Judges, Prinsep and Hill JJ., in *Meher Ali Sarkar v. Emperor* (2) (Cr. App. 742 of 1900, decided 20th Mar. 1901). There the Judges say: "It is also shown that several of the prisoners have been convicted of dacoity or other offences against property, and that some have been required to give security for good behaviour. These convictions and orders are of course evidence only against the particular persons concerned."

Clearly then the decision in *Mankura Pasi v. Queen-Empress* (3), cannot have been intended by the learned Judges to exclude such evidence in gang cases, but only in the case then before them, where they appear to have been under the impression that there was no other evidence. Then we have the case of *Madhu Dhari v. Emperor* (4) (Cr. App. 582 of 1905

(1) (1897) 1 C. W. N. 146.

(2) Unreported.

(3) (1899) I. L. R. 27 Calc. 139.

(4) Unreported.

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dated 26th July 1905, under section 401 decided by Rampini and Mookerjee JJ.) where it is said "the accused are clearly all habitual thieves. They have been repeatedly convicted of theft or have been called on to give security for their good behaviour, and many of them have been tried jointly in these cases."

In two appeals from the same District, *Khanta Karwal v. Emperor* (1) (Cr. App. 78 of 1909 decided on 28 Jan. 1909, by Holmwood and Ryves JJ.) and *Gobardhan v. Emperor* (2) (Cr. App. 958 of 1910 decided on 21st Nov. 1910, by Holmwood and Fletcher JJ.), the learned Sessions Judge, in charging the jury, cited these two cases at length and told the jury that on this authority the previous convictions were admissible. One of us was a party to each of the orders passed on these appeals, which were summarily dismissed after consideration of the point of law raised, the first by Holmwood and Ryves JJ., the second by Holmwood and Fletcher JJ.

We do not, therefore, think it necessary to admit these appeals on the point of law referred to us, as the admissibility of these convictions seems to be well established and the rules as to their weight and value have been clearly laid down. On the merits the findings of the Jury appear to be based on overwhelming evidence apart from the previous convictions. The appeals are, therefore, summarily dismissed.

E. H. M.

(1) Unreported.

(2) Unreported.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

RAMNATH PANDIT

v.

EMPEROR.*

1911

Jan. 20.

Embankment—Bengal Embankment Act (II of 1882) s. 76 (a) (b)—“Addition to existing embankment”, meaning of—Increasing height of embankment—Essentials of offence under s. 76 (b).

The words “existing embankment” in s. 76 (b) of Beng. Act II of 1882 mean an embankment existing at the time the addition is made. *Ajodhya Nath Koila v. Raj Krishto Bhar* (1) followed.

Goverdhan Sinha v. Queen-Empress (2) explained as overruled.

The only offence constituted by cl. (b), as distinguished from cl. (a) of s. 76, is the omission to obtain the sanction of the Collector to the addition to an existing embankment within a prohibited area, irrespective of the question whether such act is likely to interfere with, counteract, or impede any public embankment and public water course.

UPON the receipt of an information from Lala Triloke Nath, Executive Engineer of the Balasore Division, that the petitioner and five others had raised an embankment, the Collector of Midnapore took cognizance of the case under s. 190 (1) (c) of the Criminal Procedure Code and transferred it to Babu P. K. Ghoshal, Sub-divisional Officer of Contai, for disposal. It appeared at the hearing of the case that, in Baisak last, the petitioner employed five coolies who in his presence and under his orders threw earth on the Kantapukur *chak bundh* belonging to him situated within a mile of Sadarkhal which was included in the list of *khals* and rivers appended to the Bengal Government Notification No. 77, of the 11th March, 1901. The trying Magistrate found that the embankment in question had been increased in height by the deposit of earth by the petitioner and his men, whatever its original

* Criminal Revision, No. 1610 of 1910, against the order of K. P. Ghoshal, Deputy Magistrate of Contai, dated Nov. 18, 1910.

(1) (1902) I. L. R. 30 Calc. 481 (2) (1885) I. L. R. 11 Calc. 570

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height may have been, and he accordingly, on the 18th November 1910, convicted and sentenced them, under s. 76 (b) of the Act, to fines of Rs. 25 and 15 respectively. Ramnath thereupon obtained a Rule from the High Court to set aside the conviction and sentence on the grounds that there was no finding that the embankment had been raised above its authorized height, nor that the addition was likely to interfere with, counteract, or impede any public embankment or public watercourse.

Babu Khirode Narain Bhunia, for the petitioner.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. From the wording of the Rule it appears that it was issued under a misapprehension that s. 76 (a) applies. We find from the explanation of the District Magistrate that the case is under s. 76 (b) and the embankment is within the limits of the tract included in the notice under s. 6, which is Bengal Government Notification No. 77, dated 11th March, 1910. It is, therefore, clear that no addition can be made to the existing embankment without the permission of the Collector.

It is sought to be argued that the ruling in *Goverdhan Sinha v. Queen-Empress* (1), has not been overruled by the full Bench case in *Ajodhya Nath Koila v. Raj Krishto Bhar* (2). But it is clear from the terms of the reference that that ruling has been distinctly and clearly overruled as far as the interpretation of the words "existing embankments" in both the clauses (b) and (a) are concerned. If, as the Full Bench held, the words "existing embankments" in clause (a) mean embankments existing at the time that the addition is made, then *a fortiori* the words "existing embankments" in clause (b) must have the same interpretation, inasmuch as there is no such proviso attached to clause (b) as is attached to clause (a). The only offence constituted

(1) (1885) I. L. R. 11 Calc. 570. (2) (1902) I. L. R. 30 Calc. 481.

by clause (b) is that of omitting to obtain the sanction of the Collector to making any addition to an existing embankment within the prohibitory area. We must, therefore, hold that the conviction and sentence in this case are correct, and the Rule must be discharged.

Rule discharged.

E. H. M.

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CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Shartuddin.

THORNTON

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EMPEROR.*

1911
Jan. 28

Motor Car—Bengal Motor and Cycle Act (III of 1903), ss. 3 and 4—Use of Motor car with permission of the owner to convey his friends in his absence—Liability of Owner for the acts of his Driver in contravention of the rules framed under the Act—Rules 4, 20.

The owner of a motor car who expressly or impliedly permits his car to be used or driven by his servant is, if it is so used or driven as to contravene rule 20 of the rules framed under the Bengal Motor Car and Cycle Act (III of 1903), himself liable therefor under Rule 4 and s. 4 of the Act, though he was not in the car at the time and had given his servant general directions to observe the regulation speed, unless the latter has used it improperly for his own purposes.

Somerset v. Wade (1), *Somerset v. Hart* (2), *Collman v. Mills* (3) and *Commissioners of Police v. Cartman* (4) referred to.

THE petitioner, Edward Thornton, was tried before the Chief Presidency Magistrate, on the 5th November, 1910, charged with "driving his motor car, on the 23rd October, so rashly and negligently and at an excessive speed as to endanger human life and property," in violation of Rule 20 framed under the Bengal Motor Car and Cycle Act (III of 1903), and convicted and sentenced to a fine of Rs. 15.

* Criminal Revision, No. 1609 of 1910, against the order of T. Thornhill, Chief Presidency Magistrate of Calcutta, dated Nov. 5, 1910.

(1) [1894] 1 Q. B. 574.

(3) (1896) 66 L. J. Q. B. 170.

(2) (1884) 12 Q. B. D. 360.

(4) [1896] 1 Q. B. 655.

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It appeared that the petitioner's car containing two of his friends, he himself not being present, was driven by his chauffeur, one Gazi, along Chowringhee Road at 5-45 p.m., and nearly collided, close to the United Service Club, with a trap driven by Mr. Watson, the Additional Sessions Judge of Ali-pore. The Magistrate, after recording the evidence of Mr. Watson, asked the petitioner if he had anything to say, to which he replied that he did not impeach the evidence of Mr. Watson, but that he was not in the car at the time and that the driver was not now in his service. The Magistrate thereupon convicted the petitioner without recording his statement. The driver was subsequently prosecuted by the police and fined Rs. 20 by the same Magistrate, on the 9th November, in respect of the same occurrence.

Rule 4 of the rules framed under the Act (*vide* notification No. 1180 J. D., dated the 22nd June, 1908), is as follows:—

No person shall drive, or have charge of, or cause or permit to be used, any motor car, motor cycle or trailer which does not in all respects conform to these rules, or which is so driven or used as to contravene any of these rules:

Rule 20 runs as follows:—

A motor car or motor cycle shall not be driven recklessly or negligently, or at any speed or in any manner which is likely to endanger human life, or to cause hurt or injury to any person or animal or damage to any goods carried in any vehicle or by any person, or which would be otherwise than reasonable and proper, having regard to all the circumstances of the case, including the nature, condition and use of the street or public place and the amount of traffic which is actually on it at the time or which may reasonably be expected to be on it.

The petitioner moved the High Court and obtained a rule to set aside the conviction and sentence on the grounds that his statement was not recorded and that there was no finding that he was in the car, but a clear finding in a subsequent case that he was not driving it.

Babu Manmatha Nath Mukerjee, for the petitioner.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a rule calling upon the Chief Presidency Magistrate to show cause why the

conviction and sentence passed upon the petitioner, Mr. E. Thornton, should not be set aside on the ground that his statement was not recorded, and there is no finding that he was not in the car and there is a clear finding in a subsequent case that he was not in the car.

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As regards the first point we think it is to be regretted, considering that this is a case of first impression as to the interpretation of a rule which is not altogether free from difficulties, that a fuller record of the evidence and the plea of the petitioner was not made. It is now clear from the explanation of the Chief Presidency Magistrate that Mr. Thornton did not seek to impeach Mr. Watson's evidence, and in the absence of the chauffeur merely denied all knowledge of the offence. The only question, therefore, to be considered is the responsibility of the owner under the bye-law 4 read with rule 20 when the owner is not himself present in the car.

This is a mixed question of law and fact, and we will first consider the question of law. It appears that Mr. Thornton was summoned under rule 20 and not under rule 4. The indictment was worded "driving his motor car No. 545 so rashly and negligently and at an excessive speed as to endanger human life and property, and thus committing an offence under rule 20 of Act III of 1903."

Now although this indictment does not meet the facts, inasmuch as the petitioner was not driving, we have to see what the rule under which he was summoned requires, for it is clear that, if the rule makes it an offence to allow the car to be driven at an excessive speed, Mr. Thornton is amenable to that rule as owner and his responsibility is only limited by the terms of rule 4. Rule 20 says: "A motor car shall not be driven recklessly or negligently," and no personal responsibility is imputed to any one. When the owner, therefore, appears on a summons issued under that rule, it is no defence to say he was not driving himself if the responsibility for such driving is by law imputed to the owner by the rule which governs the person who is amenable to the law. Now rule 4 is that rule, and it appears on the face of that rule that the

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owner is responsible at law for the acts of his chauffeur. The wording of the rule is somewhat curious; it runs as follows:—
 “No person shall drive or have charge of, or cause or permit to be used, any motor car, motor cycle or trailer which does not in all respects conform to these rules, or which is so driven or used as to contravene any of these rules.”

It is evidently intended to import the doctrine of *post hoc ergo propter hoc* into the law, a doctrine which is ordinarily contrary to the spirit of the law. But that it is known to the law is clear from the case of presumptions under s. 114 of the Evidence Act and of certain decisions under the licensing laws in England which have been cited before us.

In this case the fact has to be proved that the petitioner permitted the car to be used, and then it follows under the rule that, if it is so driven or used by any one whom the owner permitted to use it as to contravene rule 20, the owner is liable to conviction. We have considered the cases of *Somerset v. Wade* (1), *Somerset v. Hart* (2), *Collman v. Mills* (3), and *Commissioners of Police v. Cartman* (4). In the case of *Collman v. Mills* (3) the other three cases were cited and discussed at the Bar, and we need only cite a passage from the judgment of Wills J., where it is clearly laid down that a bye-law couched in the terms of rule 20 is perfectly good. Wills J. says: “The bye-law must be generally consonant with the English law, otherwise it is bad. . . . It must proceed to that extent upon principles which differ from those adopted in the construction of a statute, because a statute may go beyond the common law. Now the bye-laws before us are framed under a statute passed for regulating the conduct of the business of slaughterers of cattle. Section 4 provides that the local authority may from time to time make, alter, and repeal bye-laws for regulating the conduct of any business specified in this Act.” This is the same as s. 3 of Act III of 1903, the words “modify” and “cancel” being used instead of the words “alter” and “repeal,” which are terms more applicable to laws than to rules.

(1) [1894] 1 Q. B. 574.

(2) (1884) 12 Q. B. D. 360.

(3) (1896) 66 L. J. Q. B. 170.

(4) [1896] 1 Q. B. 655.

The learned Judge goes on to say "there is, of course, a distinction between things criminal in themselves—morally wrong and wicked—and things merely made criminal because Parliament forbids them. This bye-law has been made under statutory powers to regulate the 'conduct of the business.' I agree with counsel for the appellant that, had the Act contained the words 'no animal shall be slaughtered within public view or within the view of any other animal,' the bye-law, as it stands, would have been perfectly good; such a bye-law would, in my opinion, be within the authority to make bye-laws 'for regulating the conduct of business.' Such a bye-law would impose upon the person carrying on the business the obligation to see that his servants did not do the thing forbidden. If it could be done indirectly by such language, why may it not be done in the manner in which it has been effected? and, if so, there is no objection to construing this bye-law so as to make the master liable for the conduct of his servant."

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It is clear from this *dictum* that it is rule 20 which makes the owner liable for the acts of his servant in using the motor car, and it is rule 4 which, as we shall presently see, defines the extent of that responsibility. The owner registers his car and gets permission to use it on the streets on certain terms by which he must abide as a licensee. One of these, as Wright J. points out, may be that he should be responsible for the acts of his servants. We, therefore, hold as a matter of law that the master is responsible for the act of his servant whom he permits to use his motor car.

But the learned Chief Presidency Magistrate has very properly pointed out that it is not in every case of improper user by the servant that the master should be punished. There must be permission, express or implied, to use the car. The hired driver is not permitted to ply the car for hire or for his own purposes, nor is he permitted, when he is merely taking the car home after dropping his master or his master's friends, to drive the car recklessly merely for his own amusement or caprice.

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But a general injunction to the chauffeur never to drive the car beyond the regulation speed is not sufficient to get rid of the owner's responsibility. It frequently happens, even when the owner is in the car, that the car is driven, often unwittingly, at an excessive speed. It requires an expert to estimate the actual speed at which a car is moving, but every one is supposed to know when the car is being driven recklessly or without due care and caution. Want of such knowledge cannot be pleaded by the owner who is in the car at the time, and the fact that he is unable to estimate the precise speed of the car is irrelevant. If then the owner who is in the car is liable to punishment for the conduct of his servant, although he may not at the time have realised that the car was being recklessly driven, it seems to us that he is similarly liable if he has placed the car at the disposal of his friends. He has authorised and permitted his servant to use the car to convey his own friends. Once the permission, express or implied, is given, any misuse of the car while that permission lasts is punishable, and the owner is responsible, especially so, as the Chief Presidency Magistrate points out, if, as in this case, the servant is not produced.

The Magistrates can, we think, be trusted not to strain the law so as to punish owners when the chauffeur is improperly using the car for his own purposes, but if the car is being used by the permission of the owner, he is undoubtedly liable to punishment under rule 4 and section 4 of the Act. We, therefore, discharge this rule.

E. H. M.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Chitty and Mr. Justice Coxe.

BAIKANTA NATH GOSWAMI

v.

SITA NATH GOSWAMI.*

1911

Jan. 26.

Arbitration by Court—Submission of the questions in dispute to Court for determination—Award—Review—Appeal—Jurisdiction—Civil Procedure Codes (Act XIV of 1882) s. 622: (Act V of 1908) s. 115.

When, after the hearing of a suit had commenced before a Munsif, both parties agreed to leave the questions in dispute between them to the determination of the Court after the Court had made a local inspection, and also agreed not to raise any objection to the same, or to prefer an appeal:

Held, that the decision of the Munsif was in the nature of an award and that he could not alter the award when once made, or review his own decision.

Dutto Singh v. Dosad Bahadur Singh (1) referred to.

Held, further, that no appeal lay to the District Judge, and the order of the District Judge in entertaining the appeal and making the order of remand was without jurisdiction.

Sayad Zain v. Kalabhai (2) followed.

Held, further, that no appeal lay from the decision of the District Judge to this Court, but the High Court could interfere *suo motu* under s. 622 of the Civil Procedure Code (Act XIV of 1882) corresponding with s. 115 of the new Code (Act V of 1908).

SECOND APPEAL.

THE plaintiffs brought a suit for declaration of their title to certain lands and recovery of possession of the same before the Munsif of Natore. After some witnesses had been examined the plaintiffs and the defendants, by a petition to the Court, agreed to refer their dispute to the arbitration of the Munsif in the following terms:—"In this suit we shall not raise any objection nor shall we be competent to raise any objection to the decision that your Honour may arrive at upon an inspec-

* Appeal from Appellate Decree, No. 1812 of 1908, and appeal from order, No. 483 of 1908, against the decree of A. Majid, District Judge of Rajshahye, dated June 18, 25, 1908, reversing the decree of Jadab Chandra Bhattacharji, Munsif of Natore, dated April 16, 1907.

(1) (1883) I. L. R. 9 Cal. 575. (2) (1899) I. L. R. 23 Bom. 752.

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tion of the locality; that we shall be bound by the decision of your Honour and neither of us shall be competent to raise any objection to the same or to prefer an appeal."

On the 28th of May, 1906, the Munsif made his award; and on the 8th of June, 1906, a decree was made in the terms of the award in the suit. The plaintiffs thereupon applied for a review, and the Munsif on the 16th April, 1907, made an order modifying his previous award and made a decree in the terms of the award so passed.

Against this decree the defendants appealed to the District Judge who was of opinion that the judgment of the Munsif of the 28th May, 1906, was in the nature of an award and that the Munsif having made the award he could not modify it. He accordingly set aside the order of the Munsif and remanded the suit to the lower Court.

Both the parties, thereupon, appealed to the High Court.

Babu Braja Lal Chakravarti, for the appellants in Miscellaneous Appeal, No. 483 of 1908, and for the respondents in Special Appeal, No. 1812 of 1908.

Babu Brajendranath Chatterjee, for the respondents in Miscellaneous Appeal, No. 483 of 1908, and for the appellants in Special Appeal, No. 1812 of 1908.

CHITTY J. These two appeals and application for revision may be conveniently disposed of in one judgment.

The plaintiffs instituted a suit in the Court of the Munsif at Natore for declaration of their title to and recovery of possession of certain lands. The parties are related to one another and it was in truth a family dispute.

After the hearing in the Munsif's Court had commenced and some evidence had been recorded, the parties agreed (and signified their agreement in a petition to the Court) to leave the questions in dispute between them to the determination of the Munsif, after he had inspected the locality.

The petition which was presented on 27th April, 1906, stated:—"In this suit we shall not raise any objection nor shall we be competent to raise any objection to the decision that your Honour may arrive at upon an inspection of the

locality; that we shall be bound by the decision of your Honour and neither of us shall be competent to raise any objection to the same or to prefer an appeal." Acting upon this submission, the Munsif made a local inspection of the lands in dispute and passed an order on 28th May, 1906. This was subsequently, on 8th June, 1906, embodied in a decree purporting to be made in the suit.

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The plaintiffs were not content with the decision and applied to the Munsif under section 623 of the Civil Procedure Code, 1882, for a review. This the Munsif granted on 9th March, 1907. On 16th April, 1907, he passed a second order in modification of his first order of 28th May, 1906, and again embodied the order in what purported to be a decree in the suit.

Against that so-called decree, the defendants appealed to the District Judge. The District Judge expressed an opinion that the Munsif's judgment of 28th May, 1906, was in the nature of an award and held that after delivering his award on that day it was not open to him to modify it. The District Judge appears to have thought that some portions of the Munsif's first order might be regarded as a judgment in a suit, and were thus open to review. He, however, set aside the order of the Munsif of the 9th of March and 16th of April, 1907, and remanded the suit to the lower Court for the parties to raise such objections to the Munsif's first order, regarded as an award, as they might be entitled to take under sections 520 and 521 of the Civil Procedure Code, 1882. Against that order of the District Judge, both parties have appealed to this Court: the plaintiffs, because they say it was an order of remand which the District Judge had no power to make; the defendant No. 1, for the same reason, and also because the District Judge had no power in appeal to disturb the first judgment and decree of the Munsif. The defendant No. 1 appeals as against an appellate decree, though it does not appear that the District Judge passed any decree.

We have heard the arguments of the plaintiffs' pleader. He urged (i) that the District Judge had no jurisdiction to

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entertain the appeal; (ii) that the Munsif had jurisdiction to come to a final decision and for that purpose to review his first order, and pass the second order, provided it was not beyond the agreement of the parties; and (iii) if the Munsif be regarded as an arbitrator, he had power to correct what was an apparent error in his award.

I am of opinion, that the judgment of the Munsif, dated the 28th May, 1906, was in the nature of an award, and that it did not lose that character because he embodied the operative part of that judgment in what purported to be a decree in the suit. He was in fact an arbitrator by the submission of the parties and his decision was an award. It was not open to him to alter that award when made or to review his decision: see *Dutto Singh v. Dosad Bahadur Singh* (1) and *Russell on Arbitration* pp. 114, 115. I am further of opinion that no appeal lay to the District Judge and that the District Judge in entertaining it and making the order of remand acted without jurisdiction: see *Sayad Zain v. Kalabhai* (2). In any case his order of remand would be erroneous as the Civil Procedure Code, 1882, contained no provision for a remand order of this nature. Taking this view, it follows, that no appeal lies to this Court. We have been asked by the plaintiffs to interfere in our revisional jurisdiction under section 622, and his application was ordered to be heard along with appeal from Order No. 483. Under section 622 we could interfere even without such an application. It appears to me that the order of the District Judge must be set aside as being incompetent. The orders of the Munsif, dated 9th March, 1907, and 16th April 1907, must also be set aside for the same reason. This will have the effect of restoring the first order, or, as it may be called, the award of the Munsif. Neither party can complain if they find themselves bound by a decision by which they expressly agreed to abide. Under the circumstances I would make no order as to costs.

COXE J. I agree generally.

S. A. A. A.

(1) (1883) I. L. R. 9 Calc. 575. (2) (1899) I. L. R. 23 Bom. 752.

ORIGINAL CIVIL.

Before Mr. Justice Harington.

JOHAN SMIDT

v.

RAM PRASAD.*

1911

Jan. 30.

Presidency Small Cause Court—New Trial—Powers of Bench sitting on application for new trial—Jurisdiction—Practice—Questions of fact and of law—Presidency Small Cause Courts Act (XV of 1882) ss. 37 and 38—Amendment (Act I of 1895) s. 13—Civil Procedure Code (Act V of 1908) s. 115.

The Second Judge of the Presidency Small Cause Court having dismissed a suit after trial, the plaintiffs applied under s. 38 of the Presidency Small Cause Courts Act for a new trial, and the Judges (the Chief and the Second) on such application set aside the order of dismissal and transferred the suit to the Third Judge to be tried by him. On a motion to the High Court by the defendants to set aside the order for new trial:—

Held, that s. 38 of the Presidency Small Cause Courts Act gives the Court power, *inter alia*, to order a new trial to be held; and that there is no limitation in s. 38 that the Court can only exercise the power if a question of law arises.

Sassoon v. Hurry Das Bhukut (1) referred to.

RULE obtained by Ram Prasad and others against Johan Smidt and others under section 115 of the Civil Procedure Code, 1908, to show cause why the order of the Small Cause Court granting the application for a new trial and setting aside the order of dismissal of the suit of *Johan Smidt and others v. Ram Prasad and others* should not be set aside.

A suit was instituted on the 15th September, 1909, in the Small Cause Court by Johan Smidt and others of the firm of Schroder Smidt & Co., praying for the payment of a sum of Rs. 1,200 for loss and damages on the resale of 100 maunds of shellac, which they had agreed to sell and deliver to Ram Prasad, Har Prasad and Kanai Lall, being members of the firm of Har Prasad Kanai Lall, and which the latter had failed

* In the matter of s. 115 of the Code of Civil Procedure, 1908, and the Presidency Small Cause Court Suit, No. 19, 706 of 1910.

(1) (1896) I. L. R. 24 Calc. 455.

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to take delivery of and pay for. This suit was originally heard by the Second Judge of the said Court and was on the 1st March, 1910, dismissed on the ground that there was no contract between the parties. Against this order of dismissal Schroder Smidt & Co., on the 8th March, 1910, filed an application for new trial under section 38 of the Presidency Small Cause Courts Act on the grounds that the Second Judge was in error in holding that there was no contract between the parties and ought to have held that there was a binding contract on the defendants; that the case was decided wholly against the weight of evidence; that the evidence on the record was wholly against the finding: and that the Second Judge was wrong in fact and in law, and that there had been a miscarriage of justice. On the 2nd September, 1910, this application was heard by the Chief Judge and the Second Judge and a new trial was granted by the Chief Judge (the Second Judge dissenting) and the case was transferred to the Third Judge for trial. Thereupon, the defendants moved the High Court under section 115 of the Civil Procedure Code and obtained a rule calling upon the plaintiffs to show cause why the order of the Small Cause Court, dated the 2nd September, 1910, should not be set aside. They alleged in their petition that no question of law was raised or discussed on behalf of the plaintiffs, the only question being whether, on the evidence adduced, the judge who tried the case should not have arrived at a different decision in the case. They further alleged that there was overwhelming evidence in their favour that the alleged contract was not proved and submitted that the full bench of the Small Cause Court had no jurisdiction to grant the application for new trial on a pure question of fact.

Mr. Sircar, for the plaintiffs, showed cause. In hearing matters on appeal the powers of the Presidency Small Cause Court are not limited to questions of law only, and no such limitation is put on them by section 38 of the Presidency Small Cause Courts Act. The heading of Chapter VI of this Act speaks of "New Trials and Appeals" and it was under

this Chapter that proceedings were instituted. There is nothing in this heading or in the words of sections 37 and 38 to limit the jurisdiction of the Court to those of a revisional Court or to a Court with jurisdiction to hear appeals only on questions of law.

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Mr. A. K. Ghose (senior), for the defendants, in support of the rule. At the hearing of the application for new trial no question of law was raised by the plaintiffs who relied on questions of evidence only and urged that the judgment of the Second Judge was against the weight of evidence, and a new trial was accordingly granted merely on a question of fact. I submit that the learned Chief Judge acted without jurisdiction in granting the new trial, for under sections 37 and 38 of the Presidency Small Cause Courts Act, no appeal can be entertained on a question of fact against the decree of one of the Judges of that Court. I rely on the ruling in *Sassoon v. Hurry Das Bhukut* (1). The same view was taken in *Sadasook Gambir Chund v. Kannayya* (2), *Srinivasa Charlu v. Balaji Rau* (3), *Soonderlal v. Goorprasad* (4), *Behram v. Ardeshir* (5). The jurisdiction of the Full Bench of the Small Cause Court is entirely revisional and not appellate and, therefore, questions of facts cannot be entertained by it and it has no power to set aside a decree on an appeal on a question of fact. The Small Cause Court has, therefore, I submit, exceeded its jurisdiction in this case by granting a new trial.

HARINGTON J. This rule must be discharged. Section 38 of the Presidency Small Cause Courts Act gives the Court power, *inter alia*, to order a new trial to be held. It has been argued by learned counsel in support of the rule that the Court can only exercise the power under section 38 if a question of law arises, but I find no such limitation in section 38, and I think that the judgment in the case of *Sassoon v. Hurry Das*

(1) (1896) I. L. R. 24 Calc. 455. (3) (1896) I. L. R. 21 Mad. 232.
(2) (1895) I. L. R. 19 Mad. 97. (4) (1898) I. L. R. 23 Bom. 414.
(5) (1903) I. L. R. 27 Bom. 563.

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Bhukut (1), shews that a new trial may be ordered where the judgment is manifestly against the weight of the evidence.

The rule must be discharged with costs.

Rule discharged.

Attorney for the petitioners (the defendants): *P. C. Dutt.*

Attorneys for the opposite party (the plaintiffs): *Fox and Mundul.*

O. M.

(1) (1896) I. L. R. 24 Cal. 455.

ORIGINAL CIVIL.

Before Mr. Justice Stephen.

1911
Jan. 31.

BASANTA COOMAR GOSWAMI

v.

KUMUDINI DASEE.*

Discovery—Inspection—Affidavit of documents—Practice—Civil Procedure Code (Act V of 1908) order XI, rr. 13, 18 (2).

The filing of an affidavit of documents under order 11, rule 13 of the Civil Procedure Code by one party, does not preclude the other party from subsequently applying under order XI, rule 18, para. (2), for further discovery and inspection.

APPLICATION IN CHAMBERS.

THIS was an application by the plaintiff for further discovery and inspection. The suit was instituted on the 8th February, 1910, and was one in which the plaintiff, a broker, sued for the sum of Rs. 6,046-10-6 by way of commission in respect of a loan which was in fact never effected, but in respect of which the proposed borrower and lender were brought together. The defendant, who was the intending borrower, filed her written statement on the 11th April, 1910, denying liability.

On the application of the plaintiff, an order was passed on the 14th April, 1910, directing the defendant to file a full

* Application in Original Civil Suit No. 126 of 1910.

and sufficient affidavit of documents, and on the 22nd April, 1910, in obedience to this order, the defendant filed her affidavit of documents. A copy of the affidavit was obtained by the plaintiff on the 14th May, 1910, and not being satisfied with the discovery made, the plaintiff called upon the defendant to make further discovery, and finally on the 27th May, 1910, the plaintiff wrote to the defendant enclosing a list of eighteen documents which had not been disclosed in her affidavit, and of which discovery and inspection were required. Among these documents were—(ii) Draft petition of the defendant as sent for approval to Messrs. S. D. Dutt and Ghose in April 1908 regarding the loan of 6 lacs upon which the application was made on the 8th April, 1908—(iii) Original engrossment of the above petition signed and affirmed by the defendant on the 7th April, 1908, presented before his Lordship Mr. Justice Fletcher on the 8th April, 1908, but taken back on that date when the application was ordered to be renewed on further materials.

On the defendant failing to accede to the plaintiff's requisition, the plaintiff took out a summons on the 6th December, 1910, for an order upon the defendant to disclose and give inspection of the eighteen documents enumerated in the list supplied to her on the 27th May, and filed an affidavit in support of the summons alleging that these documents were in the possession of the defendant and were relevant.

Mr. A. N. Chaudhuri, for the plaintiff. There is no question of the relevancy and materiality of the documents of which we seek discovery and inspection. Under order XI, rule 18 (2) of the Civil Procedure Code, which is based on the judgment of Sale J. in *Nittomoye Dassee v. Soobul Chunder Law* (1), the Court is given discretion to allow further inspection. The filing of an affidavit of documents is not conclusive.

Mr. B. C. Mitter, for the defendant. Order XI, rule 18 (2) of the Code is the same as the English order XXXI, rule

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18 (2), and according to the English practice, when once an affidavit of documents has been filed, the matter is concluded, and no further discovery or inspection will be allowed: Halsbury's Laws of England, Vol. XI, p. 61, *Jones v. Monte Video Gas Co.* (1), *Moghal Steamship Co. v. M'Gregor, Gow & Co.* (2); see also *Amarendra Nath Chatterjee v. Kally Kissen Tagore* (3), for the practice in India.

STEPHEN J. In this case I am asked to make an order upon the defendant to disclose certain documents and to allow inspection of them. The suit is one in which the plaintiff sues for commission in respect of a loan which was in fact never effected, but in respect of which the proposed borrower and lender were brought together. The defendant against whom the order is sought has already filed an affidavit of documents under order XI, rule 13. The plaintiff asks for discovery and inspection of the documents of which he has annexed a list to his affidavit.

He is met by an argument on the part of the defendant: that her affidavit of documents precludes any further application of this kind. This is an argument which I do not think is sustainable in this Court.

Looking at the policy of order XI and at the language of rule 18, para. 2, I do not think the defendant is thereby protected from an obligation to give inspection of other documents that may be proved to be in her possession.

Several English cases have been cited before me to show that the defendant's affidavit of documents is conclusive as to possession and also as to relevancy.

I am not prepared to say that the English practice is to be followed in all respects in this Court but I have not had any authority cited before me which I consider obliges me to hold that a statement in the usual form that an affidavit of documents mentions all relevant documents is to be taken as an answer to a subsequent application under rule 18 (2).

(1) (1880) L. R. 5 Q. B. D. 556. (2) (1886) 2 T. L. R. 752.

(3) (1896) 2 C. W. N. 17.

I therefore cannot suppose that the affidavit of documents under rule 13 precludes an application under a subsequent rule.

I have considered the merits of the present application and I consider that most of the demands made in this case are of the nature of a fishing enquiry.

Possession as regards first item in the list annexed to the plaintiff's affidavit is denied by the defendant, and such denial as a matter of course must be accepted. The second item is clearly covered by the third. The engrossment there referred to shows that an offer had been made of the loan the negotiations of which form the subject matter of the suit, and I consider that the plaintiff is entitled to inspection of No. 3; No. 4 has been waived; and as to No. 5 possession has been denied; No. 6 and 7, I hold to be privileged; No. 8 I hold to be covered by the affidavit of documents; No. 9 possession is denied; as to 11 and 13, I hold that they are not shown to be relevant; as to No. 12 inspection is waived; No. 14 is privileged; No. 10 and 15 are covered by the affidavit of documents. As to No. 16, 17 and 18 possession is denied.

The result, therefore, is that this application is granted only with regard to item No. 3. The question of costs is reserved.

Application allowed.

Attorneys for the plaintiff: *S. D. Dutt & Ghose.*

Attorneys for the defendant: *Sanderson & Co.*

J. C.

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DAMODAR NARAYAN CHOWDHRI

v.

DALGLIESH.*

P.C.*
1910

Nov. 4, 8, 9;

1911

Feb. 1.

[On appeal from the High Court at Fort William in Bengal.]

Landlord and Tenant—Leases, raiyati, zurpeshgi and others—Cultivation of Indigo—Acquisition of right of occupancy—Nature of holding Zeraat, khud-kasht and private land of landlord—Notice to quit on expiry of lease—Suit to recover land leased—Bengal Tenancy Act (VIII of 1885) s. 5 clause (5) and section 116—Raiyat—Tenureholder.

The appellants (plaintiffs) were the proprietors of the village of Ballipura Parsram; and the owners of the Hathowri Indigo Concern (the predecessors in title of the respondent, defendant) and the respondent himself, had been their tenants under various leases (raiya, zurpeshgi and others) since 1837 for the cultivation of indigo. To a suit brought to recover two areas of land of 156 bighas and 25 bighas respectively, on the ground that the latest leases (of 21st October 1891 and 10th February 1892) under which they were respectively held, had expired, the respondent pleaded as to the larger area that he had acquired occupancy rights, and that even assuming he had not acquired such rights a notice to quit was necessary under section 45 of the Bengal Tenancy Act (VIII of 1885) before he could be ejected. The latter defence alone was set up as to the smaller area. The Subordinate Judge held, on the construction of the various leases, that the larger area was the appellants' private land in respect of which, therefore (within the meaning of section 116 of the Bengal Tenancy Act) the respondent could not acquire a right of occupancy and (acting on the presumption under section 5 clause (5) of the Act, and on an admission that the smaller area was the private land of the appellants) he decided that the respondent was a tenure-holder and not a raiyat in respect of all the land in suit, and that he could be ejected without notice to quit. The High Court on appeal reversed that decision, holding, as to the larger area that the presumption under section 5 clause (5) of the Act had been rebutted, and that respondent was a raiyat and not a tenure-holder, and (notwithstanding the admission) came to a similar conclusion as to the smaller area; and decided that the respondent had acquired rights of occupancy in both areas of land, and a notice to quit was necessary before ejection.

Held (by the Judicial Committee), that on the construction of the leases and under the circumstances of the case the High Court had

* *Present*: LORD MACNAGHTEN, LORD MERSEY, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.

rightly decided as to the larger area, but were wrong in going behind the admission made as to the smaller area.

Bengal Indigo Company v. Roghobur Das (1) distinguished on the ground that in that case there was no finding of fact to rebut the presumption under section 5 clause (5) of the Bengal Tenancy Act.

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Appeal from a judgment and decree (17th May 1905) of the High Court at Calcutta, which reversed a decree (18th September 1903) of the Subordinate Judge of Tirhut.

The plaintiffs were the appellants to His Majesty in Council.

The suit out of which this appeal arose was brought on 30th November 1901 against one H. B. Dalgliesh (now represented by the respondents) and others to recover possession of two parcels of land, consisting of 156 bighas 19 cottahs and 5 dhurs, and 25 bighas and 7 dhurs, respectively, in the village of Ballipura Parsram, alleging that the tenancy created by two leases granted in 1891 and 1892 under which the said H. B. Dalgliesh was in possession had expired. The other defendants were the proprietors of the Hathowri Indigo Concern, mere formal parties who did not appear, and were not brought on to the record of the appeal to the High Court.

The grounds upon which the plaintiffs based their claim were that Ballipura Parsram was a permanently settled revenue-paying estate of which their ancestors, and afterwards the plaintiffs, were the proprietors of a half-share, and that by a Government batwara, or partition, in the year 1295 F (1888) certain defined portions were allotted to them; that 313 bighas 18 cottahs 10 dhurs of land in the village which had originally been in the kasht possession of the proprietors were leased for stated periods (with or without zurpeshgi) to the proprietors of the Hathowri Indigo Concern, of which Bandhar was an out-factory and in the ilaka of which the said lands were situate; that the said lands were in the leases and other documents always treated as the zerait or kasht lands of the landlords, and that the proprietors of the Factory were never kashtkars or raiyats thereof; that the last lease

(1) (1896) I. L. R. 24 Calc. 272, 280; L. R. 23 I. A. 158, 166.

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of the plaintiff's half-share of 156 bighas 19 cottahs and 5 dhurs, was dated 28th October 1891 up to the year 1308 F (1901) which had expired; that during the currency of the said lease, a survey by the Government was made of the village, and the Indigo Factory claimed that the 313 bighas 18 cottahs and 10 dhurs was its kasht land, a contention which the plaintiffs resisted; that the Settlement Officer decided on 17th July 1899 that the lands were not the Factory's kasht, but its bakasht; that, thereafter, the plaintiffs received a notice from the Settlement Officer alleging that the records of the proceedings had been lost and, notwithstanding their objections, on an application made by the defendant H. B. Dalgliesh (who had been a co-owner of the Hathowri Indigo Concern, and who obtained in a partition the Bandhar out-factory allotted to him as his share) the cases were heard *de novo* and on 18th April 1900 the Settlement Officer ordered that the lands were to be entered as kasht kaemi of the defendant H. B. Dalgliesh, and the record with that entry was finally published on 30th November 1900; that the said proceedings of the Settlement Officer were illegal and without jurisdiction and his decision erroneous; that the plaintiffs had also leased to the defendant H. B. Dalgliesh 25 bighas and 7 dhurs of land for a term of ten years up to the year 1308 F (1901) under a lease dated 10th February 1892, and the defendant never acquired any kasht right therein; that in the leases of 28th October 1891, and 10th February 1892, it was agreed that after the expiry of the terms whatever land remained under indigo the lessee would pay compensation for, and would give up possession after cutting the indigo; and that in Assin 1309 F (October 1901) after the indigo was finally cut, the plaintiffs demanded possession which the defendants refused.

The defendant H. B. Dalgliesh pleaded, *inter alia*, that the suit was not maintainable without a legal notice to quit being first served on him; that the 313 bighas 18 cottahs 10 dhurs of land (of which the 156 bighas 19 cottahs 5 dhurs in suit were a moiety) had been held by his predecessors in title

and by himself under kasht or direct cultivation for over 50 years, and they had acquired a right of occupancy therein; that with regard to the 25 bighas and 7 dhurs of land he did not claim similar rights, but submitted that he was entitled to a legal notice to quit; that the order of the Settlement Officer of 18th April 1900 was final and binding; and that about 1849 a suit was instituted by the plaintiff's ancestors against the Hathowri Indigo Concern for rent of the 313 bighas 18 cottahs and 10 dhurs of land in which suit the plaintiffs had treated that land as the kasht lands of the Indigo concern.

The only issues now material are "(2) Whether the suit was maintainable in the absence of notice to quit"; and "(3) Are the lands in suit the zerait of the plaintiffs or their predecessors, or were they ever in kasht possession of the same?"

The Subordinate Judge held as to the 156 bighas 19 cottahs and 5 dhurs of land that on the construction of the various leases they formed the zerait of the plaintiffs; but that even assuming that they were not the plaintiffs' zerait lands the defendant had no right to retain them beyond the terms of his lease, as in neither case had he acquired any right of occupancy in the land, being tenure-holders and not raiyats. With regard to the 25 bighas 7 dhurs of land the Subordinate Judge found it was admitted to be the plaintiffs' zerait land but the defendant had no right of occupancy in it. He made a decree for the plaintiffs for kasht possession of the lands in suit, for compensation and mesne profits. The portions of the Subordinate Judge's judgment material to these points were as follows:—

"Let me first of all see whether the above 156 bighas, odd cottahs of lands are the *zerait* lands of the plaintiffs. There is no evidence in the record to shew that these lands were ever in the *khas* possession of the plaintiffs or their ancestors. The lands have admittedly been in the continuous possession of the Hathowri Indigo Concern from the year 1837 by different leases for different periods. It is therefore almost impossible for the plaintiffs to shew by oral testimony as to how were these lands held by their ancestors prior to the year 1837. But that is not the only rule for determining the question, whether a particular

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land is the private land of the proprietor or not; sub-section 2 of section 120 of the Bengal Tenancy Act lays down that in determining this question it should be considered 'whether the particular lands were before the 2nd day of March 1883 specifically let as the proprietors' private lands.' Now the first lease was in 1837. The original *pottah* was not produced by the defendant nor have the plaintiffs been able to produce the original *kabuliyat*. A private copy of it kept by the defendant has been produced and the circumstances under which it was accepted have already been stated. In the absence of the original document or of a certified copy of it, it cannot be said what were the words used by the lessors regarding the character of the lands let out by it. The next written lease that is in the record is the *kabuliyat* of the 5th July 1859, (Ex. 7), executed by Charles Oman as *mukhtar* for the then proprietors of the Hathowri Concern in favour of Bansidhar Chowdhri, the ancestor of the plaintiffs, for the lands in suit. In this document the lands were described as '*zerait* Ballipura.' Even in the signature portion of this document the following words appear:—*viz.*, '*kabuliyat* for Ballipura *zerait*.' These words clearly mean that the executant of the *kabuliyat* was fully aware of the fact that the lands for which he gave the *kabuliyat* were *zerait* lands of the lessors. Then in the *farkati* of 1882 (Ex. 4) executed by the then manager of the Hathowri Concern in favour of Lachman Sahay and Bharat Sahay the same words '*zerait* Ballipura' appear. Now these documents clearly shew that, previous to March 1883, these lands were leased out as *zerait* lands, and that the lessees knew and admitted them to be so. It was contended on behalf of the defendants that, the words '*zerait* Ballipura' do not mean *maliks' zerait* but *factory zerait*. I do not understand why this construction is to be put on the two simple words. In my opinion they mean *zerait* lands of *mouzah* Ballipura, or in other words, *zerait* lands belonging to the proprietors of *mouzah* Ballipura. The defendant has filed copy of a rent-decree (Ex. M.) of 1849 in a suit for arrears of rent for the 300 bighas of which the lands in suit are parts, brought by the ancestors of the plaintiffs and their co-sharers against the Hathowri Concern. In this document these lands have been described as *Indigo kasht*. But this fact does not make the lands in suit as *kasht* lands of the factory and destroy the *zerait* right of the *maliks*, if they had any such right. The judgments of the said rent suits (Ex. 31 and 32) have also been produced by the plaintiffs. It would appear from these judgments that the only question for determination in that suit was, whether the quantity of land held by the defendant was as stated by the plaintiffs in that suit. There was no question before the Courts whether the lands were *zerait* lands of the *maliks* or the *raiya* lands of the factory. The Ex. M., therefore, does not show that the lands in suit were not the *zerait* lands of the proprietors. It is true that there are certain documents, *viz.* Ex. H, copy of *Batwara Khasra* prepared in 1880, (Ex. L.), copy of *pottah* by a co-sharer of the plaintiffs of 1881, and Ex. 13 (a) *farkhati* of 1891 by the Hathowri Indigo Concern to the plaintiffs, which have reference

to the lands in suit, and also to certain other lands, which are specifically described in them as malik's *khudkasht*. It was therefore contended on behalf of the defendant that, had the lands in suit been actually the proprietor's private lands, they would not have been thus distinguished from the other lands, which were stated in them as malik's *khudkasht*, but both would have been entered as *khudkasht*. But this contention does not appear to be of much importance. There is no difference between the words 'zerait' and 'khudkasht.' But as the lands in suit had been entered as 'zerait' lands of the proprietors from the beginning, they used the same word 'zerait' in respect of the lands in suit in these latter documents referred to above, and used the word *khudkasht* in respect of new *zerait* lands, that were subsequently let out. The use of the word 'khudkasht' in these documents would not therefore make the lands in suit anything other than 'zerait' or the maliks' private lands. I am therefore of opinion that, though the plaintiffs have no evidence to shew that, their ancestors were ever in khas possession of the lands in suit prior to the year 1837, since which the Hathowri Concern has been in continuous possession of them, there are documents (Exs. 7 and 4) which clearly shew that, prior to March 1883, the proprietors of the mouzah Ballipura declared the lands in suit to be their *zerait* land, and the proprietors of the Hathowri Concern understood them to be so. And this fact, I think, is under the peculiar circumstances of the case, and under the provisions of sub-section 2 of section 120 of the Bengal Tenancy Act, sufficient to show that the lands in suit are the 'zerait' lands of the plaintiffs. That being so, under section 116 of the same Act, the defendant cannot acquire a right of occupancy in respect of the lands in suit, nor do the provisions of chapter VI of the Act apply to them.

"Even if the lands in suit be considered not the *zerait* lands of the plaintiffs, let me see whether the defendant, H. B. Dalgliesh, has acquired a right of occupancy in them so as to resist the plaintiffs' right to recover khas possession.

"The defendant, H. B. Dalgliesh, is the present proprietor of the Bandhar Indigo Factory which was up to the year 1891 an out-work of the Hathowri Indigo Concern, and was, at some period after 28th October, 1891, the date of the last lease to the Concern, separated from the parent Concern and thus became an independent factory. The defendant H. B. Dalgliesh is therefore in possession of the lands in suit by virtue of the leases taken by the Hathowri Concern. The written leases that have been filed in this case are five in number. All these leases do not appear to be of the same nature. The 2nd and 5th (last) are ordinary *ticca* leases, and the 1st, 3rd, and 4th were *zurpeshgi* leases. Now a *zurpeshgi* lease is not a mere contract for the cultivation of the land let out at a rent, but is a security to the tenant for his money advanced: see *Bengal Indigo Company v. Roghobur Das* (1). The possession of the Hathowri Concern therefore, from 1244 to 1253, and again from 1278 to 1294, was therefore not that of a cultivator

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only, but that of a creditor operating repayment of the debt due to it by means of this security. These leases cannot, therefore, be the foundation for a claim for occupancy rights. A careful perusal of the lease of 21st October 1879 (Ex. 23) will clearly shew that the object of the lease was to create a security for repayment of the advance made by the Hathowri Concern to the plaintiffs' ancestors. The lease was for 9 years, and there was a provision for the repayment of the money advanced from the rents due from the year 1287 until the debt was liquidated. The same was the case with the first lease also (Ex. 12) of the year 1837. It is therefore clear that, by these leases, namely the 1st, 3rd and 4th leases, the predecessors of the defendant did not acquire any raiyati right in the lands in suit. The mere fact that they cultivated the lands with indigo or any other crops did not affect their status of mortgagees nor make them raiyats holding the lands. The last lease (Ex. 20) which was of 28th October 1891, and which, according to the terms of the lease, ended in the year 1308-F., was a simple ticca lease. This too was not a simple raiyati lease. It provided like the preceding leases in the alternative either for cultivation by the lessees or by their sub-tenants. It contained an express provision for the tenants vacating the lands at the expiration of the lease and putting them in proper order. It is, therefore, clear that the lessees were not raiyats but tenure-holders as defined in the Bengal Tenancy Act. The fact that the area of the land covered by the lease is above 100 bighas, raises a strong presumption in favour of the above conclusion (see subsection 5 of section 5 of the Bengal Tenancy Act). The mere fact that the lessees cultivated the land with indigo or other crop does not rebut the above presumption. The principle laid down by their Lordships of the Privy Council in the case of the *Bengal Indigo Company v. Roghobur Das* (1) is conclusive on this point. In that case also the tenant was an Indigo Company, and the lands in dispute were cultivated with indigo, but as they were in excess of the statutory limit their Lordships were of opinion that the Bengal Indigo Company were not raiyats but tenure-holders. Again, if the last lease be considered to be a raiyati lease, the present defendant has no right of occupancy in the lands in suit by virtue of this lease. The lease immediately preceding was a zurpeshgi lease (Ex. 23) in the strict sense of the term as I have already stated: that lease was therefore not a raiyati lease. The last lease (Ex. 20) commenced from the year 1295-F., when the present defendant was not a proprietor of the Hathowri Indigo Concern: he became a proprietor some time after the execution of this last lease, i.e., after 28th October 1891. The possession of the defendant, therefore, did not extend over 10 years at the time when the lease terminated in 1308: He has therefore acquired no right of occupancy by becoming a proprietor, and by being in possession for ten years. He is not entitled under the law to add the period of possession of his predecessors-in-title from which he did not acquire the lands in suit by right of inheritance (see

(1) (1896) I. L. R. 24 Calc. 272; L. R. 23 I. A. 158.

Lal Bahadoor Singh v. Solano (1). Again the occupation of his predecessors-in-title did not extend over 5 years. They too did not therefore acquire any right of occupancy. Therefore, in whatever way we consider the case, the defendant has no right of occupancy in the land in suit.

"The defendant has produced copies of Road-cess returns, Exs. E. (1) to E (8) submitted by the plaintiffs in respect of the mouzah Ballipura. In these returns the predecessors-in-title of the defendant have been described as raiyats and not as tenure-holders. But, against their names, there are also these words, *viz.*, 'Bahal pottah kabuliyat.' It is therefore clear that, if, by the *pottahs* and *kabuliyats* that were exchanged, the predecessors-in-title of the defendants were raiyats, they must be taken to be raiyats, or if they were tenure-holders they must be considered as tenure-holders. The mere entry of their names in one part of the return or the other by the plaintiffs will not change the character of the tenancy created by the documents. These Road-cess returns therefore do not help the defendant.

"Taking all the above circumstances into consideration, I am of opinion that, the defendant is not a raiyat holding 156 bighas odd cottahs of the lands in suit, that he has not acquired a right of occupancy in them and that he is not a non-occupancy raiyat in respect of those lands. The defendant is therefore not entitled to any notice to quit. I have already said that the question of 'zerait' or 'kasht' was not decided by the rent suit of 1846, the decision of that suit, therefore does not operate as *res judicata* in deciding the question of zerait or kasht in this suit.

"As regards the 25 bighas of land, which also form a part of the suit, and in respect of which also the defendant's kashtkari right has been declared by the Settlement Officer in the Record of Rights, the defendant admits that they are the khudkasht or the private lands of the plaintiffs. The lease (Ex. 19) of the 10th February 1892 by which these lands were let out to the defendant was for a period of 10 years from 1299 to 1308. But the defendant claims a right of occupancy in these lands also. But under section 116 of the Bengal Tenancy Act, the defendant is neither an occupancy nor a non-occupancy raiyat in respect of this land also. The term of their lease has also expired.

"The result, therefore, is that the plaintiffs are entitled to recover khas possession of all the lands in suit, and that the defendant has no right to resist the plaintiffs' claim for khas possession after the expiration of the leases, which ended in both the cases in 1308."

The High Court (RAMPINI and CASPERSZ JJ.) on appeal by the defendant H. B. Dalgliesh held that neither the 156 bighas 19 cottahs and 5 dhurs, nor the 25 bighas 7 dhurs of land was zerait land of the plaintiffs, and reversing the decision of the Subordinate Judge, made a decree dismissing the suit.

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After stating the facts they said:—

“The larger of the two areas is half of 313 bighas 18 cottahs 10 dhurs. These lands were leased by the maliks of mouzah Ballipura-Parsram, for stated periods to the owners of Hathowri Indigo Concern, which was the parent of Bandhar Factory. It is an admitted fact that the proprietors of the two factories have been in successive possession of these lands for the purposes of Indigo cultivation since the year 1837. Their earliest lease is not forthcoming, but a copy filed, even if we exclude from it certain words which are not admitted to exist in the original, shows that so long ago as 1837, the Indigo Planters obtained 300 bighas, including the larger of the two areas in suit, for the cultivation of indigo and other crops.

“The term of the first lease ended with 1253-F. (=1846). There is no lease for the next thirteen years, but the Factory remained in possession of the lands. In the second lease, of 1859, the Factory obtained the exact area with which we are now dealing, namely, 156 bighas 19 cottahs 5 dhurs, and the subsequent leases continued the tenancy down to the year 1308-F. (=1901).

“Having regard to the leases, the Road-cess returns and the evidence generally, we are of opinion that the expression *Zerait Ballipura* used in the leases, refers to the lands held as zerait by the cultivator Factory, and does not imply that the lands are the *nij-jote* of the proprietors, in which no right of occupancy can now be acquired. We have no doubt as to the correctness of the defendant's contention on this point. The Civil Courts, in the year 1850, designated such lands as the *kashtkari zerait* of the Factory. Private lands of the maliks were known as their *khudkasht*. The parties differentiated between Factory *Zerait* and malik's *khudkasht*. There being no evidence to show that the lands were ever in the khas possession of the plaintiffs, or their ancestors, our finding is that this Indigo *Zerait* does not come within the definition of proprietor's private lands, contained in section 120 of the Bengal Tenancy Act.

“We proceed to consider, in the next place, the question whether the defendant is an occupancy raiyat of the original area, 156 bighas 19 cottahs 5 dhurs, and whether he is entitled to notice before he can be ejected from it or from the other lands, 25 bighas 7 dhurs.

“We are unable to accept the contention for the plaintiff's that the leases, in virtue of which the Factory has been in possession, are merely *zurpeshgi* leases.

“Reliance is placed on the case of the *Bengal Indigo Company v. Roghobur Das* (1), where their Lordships held that ‘the leases in question were not mere contracts for the cultivation of the land let; but that they were also intended to constitute, and did constitute, a real and valid security to the tenant for the principal sums which he had advanced, and interest thereon. The tenant's possession under them was, in part at least, not that of cultivators only, but that of creditors

operating payment of the debt due to them, by means of their security.' The leases now under our consideration do not admit of a construction upon the principles laid down by the Privy Council. The earliest lease, which originated and colours the tenancy, is a zarpeshgi; it is a lease for the cultivation of indigo and other crops; but there is no stipulation for the payment of the interest. We would regard it as a lease providing for part of the rent to be paid in advance, the remainder of the rent being payable annually. During the long interval succeeding the termination of this lease, the Factory continued to cultivate the lands demised. Then, the second lease, of 1859, is not a zarpeshgi; it recites that the land is zerait of the Factory. The next is a zarpeshgi lease similar to the lease of 1837 and providing for the deduction of the sum advanced from the rents of two years, but providing also for the payment of rent during the other years of the lease. In 1879 another zarpeshgi was executed of like nature, but the last lease of 1891 was a simple *ticca pottah*. Looking to the character of all these leases, the Road-cess returns, in which the plaintiffs described the lessees of the disputed land as cultivating raiyats, and the long continued possession of the lands as private lands (zerait) of the Factory, we cannot resist the conclusion that the defendant is a raiyat entitled to grow indigo, poppy, or any other crops on payment of an annual rent of Rs. 5 per bigha.

"The pleader for the plaintiffs has, however, cited to us the case *Lal Bahadoor Singh v. Solano* (1), and he urges that the defendant did not become proprietor of the Factory until after the year 1891 when the latest lease was executed. Consequently, it would appear, that the defendant personally had not been in possession, for twelve years, of the lands in respect of which he claims to be an occupancy raiyat, when the lease came to an end in 1901. We, however, have found that he is clearly a raiyat of the land in dispute.

"It is true that the area of the lands held by the defendant exceeds one hundred bighas. We think, however, that the presumption arising under section 5 (5) of the Bengal Tenancy Act has been amply rebutted, and that the defendant is not a tenure-holder of the area, 156 bighas 19 cottahs 5 dhurs.

"In these circumstances, we consider it is not necessary for the purposes of this case to come to any definite finding whether the defendant is an occupancy raiyat or not. In any view of the matter he is a raiyat of at least 10 years standing, and is now holding over, and that being so, he cannot be ejected until his tenancy of the larger area in dispute has been determined by a notice to quit, or in some other legal manner. This admittedly has not been done. Hence the defendant who is certainly not in the position of a trespasser, cannot be ejected in this suit, and the suit as framed must fail.

"So with regard to the smaller area, 25 bighas and 7 dhurs which is admittedly the khudkasht of the plaintiffs, for similar reasons, the

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suit cannot succeed, no notice to quit having been given and the defendant's tenancy of the land not having been determined."

On this appeal,

- Kenworthy Brown*, for the appellants, contended that all the lands in suit were the zerait or khudkasht lands of the appellants within the meaning of section 116 of the Bengal Tenancy Act (VIII of 1885). The smaller area consisting of 25 bighas and 7 dhurs was admittedly so. The larger area was, it was submitted, shown to be so on the construction of

 - the various leases (referred to in the judgment of the Subordinate Judge) granted since 1837 to the respondent and his predecessors in title. Those documents clearly showed that the predecessors in title of the appellants, prior to 1883 had declared the lands to be their private lands, and had leased them on that understanding; this was sufficient to bring them under the provisions of sub-section (2) of section 120 of the Bengal Tenancy Act. The result was that under section 116 of that Act the respondent was a mere tenure-holder, and could not acquire any right of occupancy in the lands, and that Chapter VI of the Act was not applicable to them: on the expiry of his lease therefore the respondent was liable to be ejected and no notice to quit under section 45 was necessary. There was under section 5 sub-section (5) of the Bengal Tenancy Act a presumption that the respondent was a tenure-holder, and not a raiyat, and there was nothing shown to rebut that presumption. Some of the leases here were not cultivating leases, but zarpeshgi leases, and not therefore in origin raiyati holdings. Reference was made to *Bengal Indigo Company v. Roghobur Das* (1) the lease in which, it was contended, was very similar to the lease of 21st October 1891 given to the respondent. Under that lease he had, personally, only been in possession of the Bandhar Factory for 10 years and had therefore not acquired a right of occupancy in the lands comprised in it, and could not retain possession on the expiration of his lease. The Bengal Tenancy Act sections 4,

(1) (1896) I. L. R. 24 Calc. 272; I. R. 23 I. A. 158.

5 clause (4), 25, 44, 45, 116 and 120; and the Bengal Cess Act (Bengal Act IX of 1880 as amended by Bengal Act II of 1881) sections 4, 41 sub-sections (2) (3), 42, and 43 were also referred to.

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DeGruyther, K.C., and *A. M. Dunne*, for the respondent, contended that he was a raiyat of the land in suit and not a tenure-holder, referring to two cases decided under section 6 of the former Rent Acts (Act X of 1859 and Bengal Act VIII of 1869), *Durga Prosonno Ghose v. Kali Das Dutt* (1) per FIELD, J., and *Laidley v. Gour Gobind Sarkar* (2). On the construction of the leases it was clear that there was nothing in them to show that the larger area of the land was the appellants' private land; on the contrary they showed it was the zeraât and kasht land, first of the Hathowri Indigo Concern, and afterwards of the respondent H. B. Dalgliesh. The land was leased to them by the appellants and their predecessors for cultivation, which was the test of a raiyati lease, and there was no evidence whatever that those lands were ever cultivated by the appellants or their predecessors themselves. Reference was made to Wilson's Glossary, pages 266, 267, the definition of "kasht," and other words formed from it, and "zeraât," page 567, as showing the meanings to be attached to them in the construction of the leases. By their possession under these leases the predecessor in title of the respondent, and the respondent himself, had, it was submitted, acquired rights of occupancy in the larger area of land. The fact that some of the leases were "zarpeshgi" leases did not prevent them from creating a raiyati tenure. Reference was made to Wilson's Glossary, page 565, as to the meaning of "zarpeshgi" [MR. AMEER ALI referred to the case of *Ram Khelawan Roy v. Sambhoo Roy* (3)]. That point was not decided in the case of the *Bengal Indigo Company v. Roghobur Das* (4); and that case, it was submitted, was not applicable to these leases. The presumption under section 5,

(1) (1881) 9 C. L. R. 449.

(2) (1885) I.L.R. 11 Calc. 501, 506.

(3) (1898) 2 C. W. N. 758.

(4) (1896) I. L. R. 24 Calc. 272,

279, 280;

I.R. 23 I.A. 158, 165, 166.

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sub-section (5) of the Bengal Tenancy Act that the respondent was a tenure-holder had been rebutted. Even if he was not an occupancy raiyat, his position as a raiyat entitled him to a notice to quit before being ejected.

Kenworthy Brown replied citing Bengal Tenancy Act sections 48 and 85, and *Gokul Mandar v. Padmanund Singh* (1). The case of *Durga Prosonno Ghose v. Kali Das Dutt* (2) might have been law under the former Rent Acts, but was not so under the Bengal Tenancy Act.

The judgment of their Lordships was delivered by

Feb. 1.

SIR ARTHUR WILSON. This is an appeal from a decision of the High Court of Bengal, which reversed that of the Subordinate Judge of Tirhut. The suit was brought to recover possession of two areas of land, one containing 156 big-has and a fraction and the other 25 bighas and a fraction. The ground of the suit as to each plot was that the plaintiffs were the proprietors of the land and the substantial defendant Dalgliesh had been their tenant, that the tenancy had expired, and that the plaintiffs were in law entitled to recover the land. The now respondents represent Dalgliesh. There is no doubt of the fact that the plaintiffs were proprietors as they alleged, and no doubt that Dalgliesh was their tenant, and no doubt that the leases under which Dalgliesh held had, according to their terms, come to an end. The defence as to the larger plot of land was that Dalgliesh had acquired occupancy rights in the land. There was a further defence, based upon section 45 of the Bengal Tenancy Act, to the effect that even if occupancy rights had not been gained, the claim must fail for want of the notice to quit prescribed by that section. As to the smaller area the defence was based upon the latter of the two grounds alone.

The First Court held with respect to both properties that they were the proprietor's private lands within the meaning of section 116 of the Tenancy Act, and that therefore under

(1) (1902) I. L. R. 29 Calc. 707; (2) (1881) 9 C. L. R. 449.
 I. R. 29 I. A. 106.

that section no occupancy right could be acquired, and that section 45, requiring notice to quit, had no application to the case. The High Court on appeal took a different view as to each of the areas, holding that neither of them was private land under section 116, and dismissed the suit accordingly.

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The case stands quite differently with regard to the two areas. As to the larger of these, their Lordships deem it sufficient to say that, in their opinion, the learned Judges of the High Court have correctly apprehended the law applicable to the matter, and their Lordships see no ground for doubting the soundness of the conclusion of fact arrived at by the learned Judges, to the effect that the larger area was not the proprietor's private land, with the consequence that there was nothing in section 116 to preclude the acquisition by Dalgliesh of occupancy rights, and that such rights had accordingly been acquired.

With regard, therefore, to this larger plot, their Lordships are of opinion that the present appeal cannot succeed.

With reference to the smaller area, the case stands on a wholly different footing. It appears from the judgment of the Subordinate Judge that at the trial before him it was admitted that those lands were the private lands of the proprietor, and that the case proceeded and was dealt with on the footing of that admission. Their Lordships are of opinion that as to this part of the case the learned Judges of the High Court were in error in going behind that admission and reopening the question whether that smaller area was the private land of the proprietor.

In the course of the argument stress was laid upon the case of *Bengal Indigo Company v. Roghobur Das* (1), the ruling relied upon being that on page 166 of 23 I. A. Their Lordships think that case has no bearing on the present. In that case what was ruled was that the presumption laid down in section 5, sub-section 5 of the Bengal Tenancy Act applied, there being no finding of fact to exclude that presumption under the terms of the clause. In the present case there is

(1) (1896) I. L. R. 24 Calc. 272, 280; L. R. 23 I. A. 158, 166.

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such a finding, and their Lordships see no reason to question it.

The result, in their Lordships' opinion, is that this appeal should be disallowed so far as relates to the larger of the two areas, but that so far as it affects the smaller area the judgment and decree of the High Court should be set aside and those of the Subordinate Judge restored, and their Lordships will humbly advise His Majesty accordingly.

With regard to costs, inasmuch as each party has succeeded in part and failed in part, there will be no order either here or below.

Appeal partly dismissed and partly allowed.

Solicitors for the appellants: *Watkins & Hunter.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.

ORIGINAL CRIMINAL.

Before Mr. Justice Carnduff.

1911
 Feb. 6.

EMPEROR

v.

KERAMAT SIRDAR.*

Confession—Joint trial—Plea of guilty by co-accused—Acceptance of plea by the Court and removal of co-accused from the dock—Trial of remaining prisoner alone—Admissibility of confession of co-accused against prisoner on trial—Evidence Act (I of 1872) s. 30.

Where a co-accused pleads guilty, and the Court has accepted the plea and directed his removal from the dock, and the trial proceeds against the remaining prisoner alone, a confession by the former is not admissible *under s. 30 of the Indian Evidence Act, 1872, against the latter.

Queen-Empress v. Pahuji (1) approved.

The prisoner, Keramat Sirdar, was committed with four others by Mr. N. L. Bagchi, Presidency Magistrate of Calcutta,

*Original Criminal.

(1) (1894) I. L. R. 19 Bom. 195

on a charge of dacoity. They were arraigned at the First Original Criminal Sessions of the High Court held on the 6th February 1910. When called upon to plead, Keramat Sirdar pleaded not guilty, but the others pleaded guilty. The presiding Judge thereupon recorded the pleas of the latter, intimated his acceptance thereof, and directed their removal from the dock without immediately convicting or sentencing them. The trial then proceeded against Keramat alone.

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Mr. Shelley Bonnerjee, for the Crown, raised the question of the admissibility of the confessions of the prisoners who had pleaded guilty, against Keramat, and referred to *Queen-Empress v. Chinna Paruchi* (1), *Queen-Empress v. Paltua* (2), and Woodroffe's Evidence Act, 5th Ed., p. 177.

CARNDUFF J. In this case five persons were placed before me in the dock, all charged with dacoity. Four of them pleaded guilty, while the fifth pleaded not guilty. I recorded the former plea and indicated my acceptance of it by directing that, in accordance with my usual practice, the accused be brought up for sentence at the end of the Sessions. The fifth is now on his trial alone, and the question has been raised whether certain statements made by the others can now be proved and taken into consideration against him under section 30 of the Evidence Act. Taking the same view as was taken in *Queen-Empress v. Pahuji* (3), I am of opinion that this cannot be allowed.

[At the close of the trial of Keramat, who was found guilty by the Jury, his Lordship directed the other prisoners to be brought up, and sentenced all the five accused to various terms of rigorous imprisonment.]

E. H. M.

(1) (1899) I. L. R. 23 Mad. 151. (2) (1900) I. L. R. 23 All. 53.

(3) (1894) I. L. R. 19 Bom. 195.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

1911
Feb. 7.

BASIRAM MALO

v.

KATTYAYANI DEBI.*

*Attachment—Civil Procedure Code (Act XIV of 1882), ss. 256, 488 and 490—
Attachment before judgment—Omission to take objection that the attached
property was not saleable—The effect of such omission in subsequent execu-
tion proceedings.*

An attachment before judgment does not for all purposes stand on the same footing as an attachment in execution proceedings.

An omission on the part of the defendant to take exception to the validity of the attachment on the ground that the property sought to be attached is not transferable, at the time when the application is made for attachment before judgment, does not operate as a bar to the investigation of the objection when an application has been made for execution of the decree made in the suit.

SECOND APPEAL by the petitioner, Basiram Malo.

One Kattyayani Debi obtained a decree for money against the petitioner Basiram Malo, and attached the dwelling-house and granary belonging to the judgment-debtor. The judgment-debtor put in an application before the Munsif of Narayanganj stating that the properties attached were not saleable and as such they should be exempted from attachment. It appeared that these properties were attached before judgment, and the defendant in the original suit, the aforesaid Basiram Malo, though notice was served on him and he contested that suit, did not raise any objection to this attachment. The decree-holder, opposite party, contended that the petitioner was precluded from raising this objection which he had waived when the property was attached before judgment.

*Appeal from order, No. 200 of 1910, against the order of B. B. Newbould, District Judge of Dacca, dated Feb. 5, 1910, affirming the order of Sarat Chandra Banerjee, Munsif of Naraingunge, dated Oct. 6, 1909.

The Court of first instance gave effect to the objection raised by the opposite party, and rejected the application. On appeal by the petitioner, the learned District Judge of Dacca affirmed the decision of the first Court.

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DEBI.

Against that decision the petitioner preferred this second appeal to the High Court.

Babu Rajendra Chandra Guha, for the appellant.

Dr. Sarat Chandra Basak, for the respondent.

MOOKERJEE AND TEUNON JJ. This is an appeal against an order by which the Court below in concurrence with the Court of first instance has overruled, without any investigation, an objection by the judgment-debtors that the property sought to be sold in execution of a decree for money obtained against them is not transferable. The learned Judge has held that an investigation of this question is barred by the omission of the judgment-debtors to urge the objection when the property in question was attached before judgment. The question is one of some novelty; but upon an examination of the provisions of the Code we feel no doubt as to the manner in which it ought to be answered. The contention of the decree-holder is to the effect that when an application is made by a plaintiff for attachment of the property of the defendant before judgment, it is the duty of the defendant to take exception to the attachment, on the ground that the property is not saleable within the meaning of section 266 of the Code of 1882. It has been argued, on the other hand, on behalf of the judgment-debtors that the only question before the Court at this stage is whether circumstances have been established such as would justify the grant of attachment before judgment, and that the question of the true character of the property sought to be attached need not be investigated till a decree has been obtained by the plaintiff by virtue of which he becomes entitled to proceed with execution on the basis of the attachment before judgment. In our opinion, the scope

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of the investigation by the Court when an application is made for attachment before judgment, is defined by section 483 of the Code of 1882. The plaintiff before he can obtain an order for attachment before judgment must satisfy the Court that the defendant is about to dispose of the whole or any part of his property, or to remove the same from the jurisdiction of the Court in which the suit is pending, or has quitted the jurisdiction of the Court having therein property belonging to him. If the Court is satisfied that these elements exist, the defendant is to be called upon to furnish security, and upon his failure to furnish the security demanded, his properties are to be attached at the instance of the plaintiff. That attachment, however, is of no assistance to the plaintiff till he obtains his decree. If he is ultimately unsuccessful, under section 488 the attachment has to be withdrawn. If he is successful, section 490 provides that re-attachment is unnecessary in execution of the decree obtained by him. But there is no foundation for the contention of the respondent that an attachment before judgment and an attachment in execution stand precisely on the same footing for all purposes. The distinction between attachments of these two descriptions was lucidly explained by Mr. Justice Dwarka Nath Mitter in the case of *Sri Ram Manik v. Tinowry Rai* (1). The learned Judge pointed out that the objects for which the two kinds of attachment are made are entirely different: "An attachment prior to decree is not an attachment for the enforcement of the decree, but it is a step taken merely for the purpose of preventing the debtor from delaying or obstructing such enforcement when the decree subsequently passed shall be sought to be executed. An attachment after decree is, on the other hand, an attachment made for the immediate purpose of carrying the decree into execution, and it presupposes an application on the part of the decree-holder to have his decree executed." The learned vakil for the respondent has, however, contended on the authority of the decision of the Judicial Committee in the case of *Mungul Pershad v.*

Grija Kant (1) and upon the decision of this Court in the cases of *Durga Charan v. Kali Prasanna* (2), *Sheikh Murullah v. Sheik Burullah* (3), *Coventry v. Tulshi Pershad Narayan* (4), and *Dwarkanath Pal v. Tarini Sankar Ray* (5), that the omission of the defendant to take exception to the validity of the attachment on the ground that the property sought to be attached is not transferable at the time when the application is made for attachment before judgment, operates as a bar to the investigation of the objection when an application has been made for execution of the decree made in the suit. The cases relied upon are clearly distinguishable. They are cases in which applications have been made for execution of subsisting and enforceable decrees, and it has been held that when in proceedings in execution of such a decree an order for attachment has been made without any objection, its validity cannot subsequently be questioned by the judgment-debtor. In this class of cases, it is obvious that if exception is not taken to the attachment, the next step in execution must necessarily follow; that is, an order for sale of the property attached must be made. Consequently, if the judgment-debtor contends that the property is incapable of attachment, because it is not transferable, the proper stage at which the objection can be urged is when the application for attachment is made. In the case before us, however, no steps could possibly be taken on the basis of the attachment before judgment till a decree had been made in favour of the plaintiff. In our opinion, it would be a needless hardship on the judgment-debtor if he was obliged, at the stage when an application was made for attachment before judgment, to take exception to the validity of the attachment on the ground that the property was not transferable. It has not been disputed that if this contention prevailed and an investigation was made as to the character of the property attached at this stage, the order would be final, because the Code does not provide

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(1) (1881) I. L. R. 8 Calc. 51. (3) (1905) 9 C. W. N. 972.
(2) (1899) I. L. R. 26 Calc. 727. (4) (1904) 8 C. W. N. 672.
(5) (1907) I. L. R. 34 Calc. 199.

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for any appeal against such an order. On the other hand, if it is held that such an objection may be taken as soon as an application for execution has been made after the decree, the investigation would be one under section 244 of the Code of 1882, and the propriety of the order could consequently be tested by appeal upon questions of fact as well as law. Much reliance was placed by the learned vakil for the appellant upon the provisions of section 487 of the Code of 1882, which lays down that if any claim be preferred to the property attached before judgment, such claim shall be investigated in the manner provided for the investigation of claims to property attached in execution of a decree for money. This provision, in our opinion, shows that the contention of the respondent cannot be supported, because, if an attachment before judgment stands for all purposes on precisely the same footing as an attachment in an execution proceeding, section 487 would be entirely superfluous. The Legislature intended that investigations of claims to property attached before judgment should be determined at that stage, when such claims are preferred by persons who are strangers to the suit. If the Legislature had also intended that an objection of the description taken before us should be investigated at this stage, an appropriate provision in that behalf would have been made in the Code. It follows, therefore, that an attachment before judgment does not for all purposes stand on the same footing as an attachment in execution proceedings. This, indeed, is obvious from first principles. The attachment does not of necessity ensure the property to the person who attaches it. He becomes entitled to proceed against it only if he eventually gets a decree. The plaintiff must not only wait until he has obtained a decree; it is not competent to him to proceed against the property attached until he has also taken the preliminary steps which the law requires for its enforcement; in other words, he must apply for execution, just like any other creditor: *Aga Mahomed Ali Shiraji v. S. E. Judah* (1), *Pallonji Shapurji v. Edward Vaughan Jor-*

dan (1), *Sewdut Roy v. Sreecanto Maity* (2), and *Bhugwan Kiritratna v. Chundra Mala Gupta* (3).

The result, therefore, is that this appeal must be allowed and the order of the Court below discharged. The case will be remitted to the Court of first instance, in order that the objection taken by the judgment-debtors may be investigated upon evidence to be adduced by the parties. The appellants are entitled to their costs both here and in the Court of Appeal below. The costs in the Court of first instance will abide the result.

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*Appeal allowed;
case remanded.*

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- (1) (1888) I. L. R. 12 Bom. 400. (3) (1902) I. L. R. 29 Calc. 773;
(2) (1906) I. L. R. 33 Calc. 639. 1 C. L. J. 97.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1911
Feb. 7.

KALI DAS CHUCKERBUTTY

v.

EMPEROR.*

Misjoinder—Commission of criminal breach of trust in the same transaction as abetment of cheating and attempt to cheat and as part of a common design—Joint trial of one accused under ss. 408 and 439 with another under ss. 439 of the Penal Code—Legality of separate sentences—Concurrent sentences—Criminal Procedure Code (Act V of 1898) s. 239.

Where A, a railway ticket collector, made over two used tickets, which he had collected from passengers, to B, and instructed him to apply for a refund of the fares covered by the same, as unused tickets, at the place of issue, and the latter proceeded there and made such an application but was discovered in the act:—

Held, that the joint trial of A on charges under ss. 408 and 439 and of B, under ss. 439 of the Penal Code, was legal under the provisions of s. 239 of the Criminal Procedure Code.

* Criminal Revision, No. 69 of 1911, against the order of T. S. Macpherson, Additional Sessions Judge of Hooghly, dated Dec. 20, 1910.

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Parmeshwar Lal v. Emperor (1) distinguished. *Subrahmania Ayyar v. King-Emperor* (2) referred to.

Held, also, that A had committed two distinct offences in the same transaction and that separate sentences were not illegal, though concurrent sentences were, under the circumstances, more appropriate.

Re Noujan (3) referred to.

The two parts of section 239 of the Criminal Procedure are not mutually exclusive: so that if A induces B to cheat, and B attempts to do so, they may be tried together for abetment of, and attempt at, cheating respectively; and if in the course of the same transaction A commits the separate offence of criminal breach of trust, in furtherance of the conspiracy to cheat, he may be separately charged for such offence at the same trial.

On the 12th September, 1910, the petitioner, a ticket-collector in the service of the East Indian Railway Co. at Sheoraphuli, gave one Aswini Kumar Seal two used third class tickets, issued on the morning of the same day from Haripal, on the Tarkessur Branch line, to Sheoraphuli. The latter entered the train which was then at the Sheoraphuli station and proceeded to Haripal. After alighting from the carriage he went out of the station for a few minutes, and then returned and went to the Assistant Station Master and demanded a refund of the fares on the two tickets given him by the petitioner, alleging that his aunt had purchased them for herself and another female but was too ill to travel. It appeared that an audit-inspector, Annada Charan Chatterjee, who had been placed on special duty to detect ticket frauds and had seen the petitioner hand over the tickets to Aswini at Sheoraphuli, followed the latter in the same train to Haripal. The Assistant Station Master took Aswini to the office of the Station Master where the auditor was then present. The latter challenged Aswini, who thereupon admitted that the tickets had been given him by the petitioner. He also wrote out a confession to the effect that the petitioner, who was a friend of his, had given him the tickets with instructions to return with one ticket and to sell the other. Aswini was taken to Sheoraphuli where he identified the petitioner as the person who had handed him the tickets.

(1) (1909) 13 C. W. N. 1089. (2) (1901) I. L. R. 25 Mad. 61.

(3) (1874) 7 Mad. H. C. R. 375.

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The petitioner and Aswini were tried together before the Deputy Magistrate of Serampore, the latter being charged under ss. $\frac{120}{511}$ of the Penal Code, and the former under s. 408 in respect of the tickets, and under ss. $\frac{120}{109}$. They were convicted on the above charges on the 8th September, 1910, and the petitioner was sentenced to five months' and six months' rigorous imprisonment, respectively, on the charges against him, the sentences being directed to run concurrently. He appealed from the said order to the Additional Sessions Judge of Hooghly who, by his judgment, dated the 20th December, 1910, upheld the conviction and sentences. The Judge found that the petitioner had directed Aswini to obtain a refund of the two fares and instructed him how he should set about it, disbelieving the latter's story as to the disposal of the tickets in his confession. The petitioner then moved the High Court and obtained the present Rule.

Babu Manmatha Nath Mukerjee, for the petitioner
Mr. Sinha and Babu Joy Gopal Ghose, for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate to show cause why the conviction of, and sentences on, the petitioner, Kali Das Chuckerbutter, should not be set aside or why a retrial should not be ordered, or why the sentences should not be reduced or otherwise modified on the ground that there had been misjoinder of charges, and that the petitioner is, if guilty, only liable to be punished for a single offence.

The facts deposed to and found by the lower Courts are that the petitioner, being a ticket collector on the E. I. Railway at Sheoraphuli, was seen to hand two third class tickets to a man named Aswini Kumar Seal just after the arrival of a train from Haripal to Sheoraphuli. These tickets had been used and collected from passengers by the petitioner. A travelling inspector who was deputed to look out for frauds in connection with used tickets, which had been frequent of late, followed Aswini Kumar Seal and returned with him in the same train to Haripal. There he saw and heard Aswini

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claim a refund on the two tickets which he said had been purchased by his aunt in the morning and had not been used. To make the story more plausible he had left the station with the other passengers and had returned again after a few minutes. On arrest he made a clean breast of the matter, and stated that he had been employed by his friend, the petitioner, to carry out this fraud.

He was then taken back to Sheoraphuli, and it is said that the present petitioner also admitted his guilt and begged for mercy when confronted with Aswini. He has since retracted his confession and pleads that the Station Authorities were persons in authority within the meaning of the Evidence Act, and their presence and pressure induced him to confess. This may be conceded. On these facts the petitioner was charged with criminal breach of trust under section 408 and with abetment of cheating under section 420 read with section 109 of the Penal Code, and tried at the same trial with Aswini Kumar Seal who was charged with attempt at cheating under section 420 read with section 511 of the Penal Code.

We have heard Mr. Sinha showing cause against the Rule and the learned vakil in support, and we do not think that this case falls within the rule laid down in *Subrahmanya Ayyar v. King-Emperor* (1). The case of *Parmeshwar Lal v. Emperor* (2) which has been cited to us, as the case most nearly approaching this one in the books, is clearly distinguishable. There the accused cashed the cheques and not only completed the breach of trust but proceeded to cheat his masters by a wholly independent act, not necessarily connected with the embezzlement of the money. Had he conspired with the railway clerk, handed over the cheques drawn by his masters to him and induced him to make over the goods to him and the balance of the money, the case would have borne some resemblance to this one, and there might have been no misjoinder.

Here the transaction is clearly one, and falls within the purview of section 239. The two clauses of section 239 are

(1) (1901) I. L. R. 25 Mad. 61. (2) (1909) 13 C. W. N. 1089.

not mutually exclusive. A induces B to cheat. B attempts to cheat in consequence. A and B may clearly be tried together for abetment of, and attempt at, cheating respectively. If in the course of the same transaction A commits the separate offence of criminal breach of trust, in furtherance of the conspiracy to cheat, A may clearly be charged with that offence at the same trial.

The only other question is whether, having regard to the necessary hypothesis that the offences are committed in the same transaction, separate sentences can be passed against the petitioner on each charge. It appears to us that they can. In this case it is true that the cheating could not be carried out without the prior misappropriation of the tickets, but the conversion of the misappropriated tickets might have been made in some other way than by inducing the second accused to commit cheating. The eventual method of conversion is not the misappropriation, it is only evidence of the way the misappropriation was rendered successful. Having elected to make the conversion in this way the petitioner's conduct becomes part of the same transaction, but he commits two different offences within the meaning of section 239 and he can be separately punished for those offences.

The most that can be said in a case of this kind, when the transaction is continuing with the dishonest purpose which originally made it criminal, is that the Court exercises a wise discretion in making the sentences run concurrently, as was done in this case. We are fortified in this view by the fact that illustrations (e) and (h) of section 454 of the old Code were omitted in the present Code and its immediate predecessor after the decision in *Re Noujan* (1), where it was held that "section 454 (now 235) taken with its illustrations forbids two punishments for an offence so compounded that one substantive offence is the aim of the other and evidentiary matter of the intent necessary to constitute that other."

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That was the case of abducting a child with the intent of dishonestly taking its ornaments under section 369 of the Indian Penal Code, and would raise a similar question to the disputed point whether separate punishment can be inflicted for house-breaking with intent to commit theft and for theft in a dwelling-house consequent upon such house-breaking. That, however, is also a different question to the one which arises in this case, and is governed by section 71 of the Indian Penal Code.

As the sentences have been made to run concurrently, we need not discuss the point further, especially as the whole amount of punishment awarded could have been given under either section.

The Rule is accordingly discharged and the petitioner will surrender to his bail to serve out the rest of his sentence.

Rule discharged.

E. H. M.

ORIGINAL CIVIL.

Before Mr. Justice Stephen.

1911
 Feb. 9.

NABINCHANDRA SAHA PARAMANICK

v.

KRISHNA BARANA DASI.*

*Vendor and Purchaser - Contract of sale—Breach by vendor—Loss of bargain—
 Liability of vendor—Transfer of Property Act (IV of 1882) s. 55 (1) (g)—
 Measure of damage.*

The owners of certain immovable property, which was under a mortgage, entered into a contract for the sale of the property, but subsequently declined to complete the sale, on the ground of the existence of the mortgage. Thereafter the property was acquired, under the Land Acquisition Act, by the Local Government; and the compensation paid to the owners, including the statutory allowance of 15 per cent., far exceeded the contract price.

* Original Civil Suit No. 384 of 1910.

On a suit brought by the purchaser for damages for breach of the contract of sale:—

Held, that the vendors were bound to convey the property free from incumbrances, and the existence of the mortgage was no defence to the purchaser's action.

Engell v. Fitch (1), *Day v. Singleton* (2), *Jones v. Gardiner* (3) referred to.

Flureau v. Thornhill (4), *Bain v. Fothergill* (5) distinguished.

Semble: The ruling in *Bain v. Fothergill* (5), does not apply to India, and there is no exception to section 73 of the Indian Contract Act, in the case of sale of immovable property.

Ranchhod v. Manmohan Das (6) and *Pitamber Sundarji v. Casibai* (7) referred to.

The measure of damage was the difference between the contract price and the compensation allowed to the vendors, excluding, however, the statutory allowance of 15 per cent. inasmuch as the breach had occurred before the acquisition.

ORIGINAL SUIT.

On the 15th December 1908, the defendants Sreemati Krishna Barana Dasi and her son, Satish Chunder Mitra, entered into an agreement with the plaintiff, Nabinchandra Saha Paramanick, for the sale of their half share in the land and premises No. 199-5, Upper Chitpur Road, in Calcutta, for the sum of Rs. 18,881-2-4 at the rate of Rs. 650 per cottah, the sale to be completed within a month. The sum of Rs. 501 was duly paid as earnest money by the plaintiff.

On the 26th January 1909, the defendants informed the plaintiff that they could not fulfil their contract as they had previously sold their half share to one Gokul Chand Bural. The plaintiff refused to accept this excuse and insisted on the fulfilment of the contract.

On the 5th April 1909, the defendants again pleaded inability to perform their contract, this time on the ground that they had mortgaged the half share in question along with several other properties, and the mortgagees refused to release it. The plaintiff, however, still insisted on the fulfilment of the contract.

(1) (1869) L. R. 4 Q. B. 659.

(2) [1899] 2 Ch. 320.

(3) [1902] 1 Ch. 195.

(4) (1776) 2 W. Bl. 1078.

(5) (1874) L.R. 7 E. & I. App. 158.

(6) (1907) I. L. R. 32 Bom. 165.

(7) (1886) I. L. R. 11 Bom. 272.

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On the 24th April 1909, Gokul Chand Bural brought an action against the present defendants and Paramanick for specific performance of their alleged agreement of sale to him, and for an injunction restraining them and Paramanick from completing the contract of the 15th December 1908. The action was, however, abandoned by Gokul on the 13th September 1909. Thereupon on the 18th September, the present plaintiff called on the defendants to complete their contract, but they refused to do so.

In the meanwhile on the 28th April 1909, the Local Government had published a declaration under the Land Acquisition Act, announcing their intention of acquiring the whole of the premises No. 199-5, Upper Chitpur Road, for a public purpose. The premises were duly acquired by the Government, and on the 14th October 1909, the Collector made his award allowing the defendants for their half share in the premises, at the rate of Rs. 850 per cottah, the sum of Rs. 28,394-5-5 including the statutory compensation of 15 per cent. This sum of Rs. 28,394-5-5 was withdrawn under protest by the defendants through the mortgagees on the 9th November 1909. Subsequently a reference was preferred to the District Court by the defendants for the enhancement of the award, which reference was still pending and undetermined at the date of the present suit.

The plaintiff brought this action for breach of the contract of sale to him of the half share in question, and claimed as damages the sum of Rs. 10,014-3-1 being the difference between Rs. 18,380-2-4, the sum still remaining unpaid by him in respect of the contract price, and Rs. 28,394-5-5, the sum which was paid to the defendants by the Local Government.

Apart from certain pleas raised in their written statement, which they did not press at the trial, the defendants contended that no breach of contract had been committed by them, as they were unable to convey the property free from incumbrances, inasmuch as the mortgagees declined to release the property, and, further, that the damages claimed were excessive and too remote. The defendants offered to refund the

earnest money to the plaintiff and to pay all costs incurred by him. The main issues raised at the trial were:—

(i) Are the defendants bound under the contract to convey the property free from incumbrances, or are they bound to convey such interest only as they have in the property?

(ii) What is the true measure of damages?

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Mr. Sinha (with him *Mr. A. N. Chaudhuri*), for the plaintiff. Under section 55 (1) (g) of the Transfer of Property Act, it is the duty of the vendor of immovable property to discharge all incumbrances existing at the time of sale. The existence of the mortgage was no defence to a claim for damages for breach of contract, as the breach of contract arose not from the inability of the defendants to make a good title, but from their not discharging the incumbrances which it lay in their power to do: *Mayne on Damages*, 8th edition, pp. 238—245: *Engell v. Fitch* (1), and on appeal (2). *Bain v. Fothergill* (3), which re-affirmed the rule in *Flureau v. Thornhill* (4), applies only to the case of a sale, where the vendor is incapable of making a good title, and does not overrule *Engell v. Fitch* (2): see *Day v. Singleton* (5) and *Jones v. Gardiner* (6). There was no question in this suit of any defect in the defendants' title to the property. *Robinson v. Harman* (7) was also referred to.

Mr. B. C. Mitter (with him *Mr. Sircar*), for the defendants. *Engell v. Fitch* (2), is in direct conflict with the decision of the House of Lords in *Bain v. Fothergill* (3), and must now be considered bad law. The reason for the decision seems to be that the damage cannot be assessed. As long as a mortgage is subsisting the legal estate lies in the mortgagee, the mortgagor having only the equitable interest, the equity of redemption. Hence there was a defect in the defendants' title, although it might be curable by paying an extravagant

(1) (1867) L. R. 3 Q. B. 314.

(4) (1776) 2 W. Bl. 1078.

(2) (1869) L. R. 4 Q. B. 659.

(5) [1899] 2 Ch. 320.

(3) (1874) L. R. 7 E. & I. App. 158. (6) [1902] 1 Ch. 191.

(7) (1848) 1 Exch. 850.

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sum of money. Where the vendor acts in good faith, the purchaser is entitled by way of damages only to the cost of the investigation of title.

Cur. adv. vult.

STEPHEN J. This suit was originally decreed by me *ex parte* on the defendants failing to appear when the case was called on. Subsequently the defendants proved facts that led me to suppose that I might have been misled by evidence which showed that one of the defendants was in the High Court at the time I heard the suit, and was intentionally absentsing himself from my Court; and I re-instated the case accordingly.

The plaint in the case, as far as it is material, is as follows. On the 15th December 1908, the defendants contracted to sell and the plaintiff to buy a half share in land in Calcutta, at the rate of Rs. 650 a cottah which came to Rs. 18,581-2-4 and the plaintiff paid Rs. 501 as earnest money: the sale to be completed within a month. On the 26th January 1909, the defendants informed the plaintiff that they could not fulfil their contract as they had previously sold the share in question to one Gokul Chand Bural, but the plaintiff refused to accept this excuse. On the 5th April, the defendants informed the plaintiff that they could not perform their contract because they had mortgaged the half share along with other property, and the mortgagees refused to release it. This excuse also the plaintiff refused to accept. Gokul next brought a suit against the present defendants and the plaintiff in which he sought to have a decree for specific performance against the defendants and to have them and the plaintiff restrained from completing the contract already mentioned. This suit was abandoned, and on the 18th September the plaintiff called on the defendants to complete their contract, but this the defendants refused to do.

Meanwhile, on the 28th April, the Local Government published a declaration under the Land Acquisition Act announcing their intention of acquiring the premises in question

for a public purpose. This they eventually did paying for them a sum of Rs. 28,394-5-5 being at the rate of Rs. 850 a cottah. The plaintiff now sues for Rs. 10,014-3-1, the difference between the sum he contracted to pay beyond the Rs. 501, and the sum which was paid to the defendants by the Local Government in respect of the half share, which he alleges is the damage he has sustained by the breach of his contract by the defendants.

The defendants, apart from pleas that they have given up, plead that they have not committed any breach of contract in being unable to convey the property free from incumbrances to the plaintiff inasmuch as the mortgagees refused to release it; they deny that the plaintiff was always ready and willing to complete the contract, and they say that the damages claimed are excessive and too remote.

Issues were settled of which I need mention only the last three, as the contest in the case concerned them only: these were—

“(3) Was the plaintiff ready and willing to perform the contract mentioned in the plaint?

(4) What is the true measure of damages?

(5) Are the defendants bound under the contract to convey the property free from incumbrances, or are they bound to convey such interest only as they have in the property?”

The plaintiff opened his case by addressing me on the fifth issue, an adverse decision on which would render further argument unnecessary. Taking the facts relating to the mortgage set out in the pleadings which have not in fact been disputed, he contended that the vendor was bound to discharge all incumbrances on the property at the date of the sale under section 55 (1) (g) of the Transfer of Property Act, which is, of course, merely an expression of previously well-established law. The mortgagee's interest was such an incumbrance, and did not affect the title of the defendant so as to bring the case within the rule laid down in *Flureau v. Thornhill* (1). He admitted that the purchase-money for the

(1) (1776) 2 W. Bl. 1078.

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property sold would not suffice to redeem the mortgage which included other property, and in which other mortgagors were concerned: but he contended that so long as the vendor had legal rights which if enforced would enable him to clear the property from the incumbrance of the mortgage he was bound so to clear it, whatever the cost might be, and would be liable in default on failing to do so. I consider this argument sound for the following reasons: The general law, which is only worth stating because of the exception to it, is that a man is liable for damages arising from a breach of contract. An exception to this rule was laid down in *Flureau v. Thornhill* (1), that upon a contract for the purchase of real estate, if the vendor without fraud, is incapable of making a good title, the intending purchaser is not entitled to any compensation for the loss of his bargain. This rule after being limited in various ways was re-affirmed in modern times by the House of Lords in *Bain v. Fothergill* (2). In that case Lord Chelmsford says "I think the rule in *Flureau v. Thornhill* (1), as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." This decision does not, in my opinion, cover the present case. There is here no question of the mortgagor's title. His title was perfectly good, but it was subject to the claim of the mortgagee which could be got rid of by payment of the debt which the mortgagor owed, and the question of how much he would have to pay, whether less or more than the amount of the purchase-money, could not affect the rights of the plaintiff. That this is so, is shewn by the case of *Engell v. Fitch* (3), where mortgagees with power of sale sold to the

(1) (1776) 2. W. Bl. 1078.

(2) (1874) L.R. 7 E. & I. App. 158.

(3) (1869) L. R. 4 Q. B. 659.

plaintiff, but took no steps to eject the mortgagor which they could have done, and it was held that the rule in *Flureau v. Thornhill* (1), did not apply. The decision seems to have been based chiefly on the case of *Hopkins v. Grazebrook* (2), which established an exception to the rule in *Flureau v. Thornhill* (1), which is expressly overruled in *Bain v. Fothergill* (3). But in *Day v. Singleton* (4), it was held that *Engell v. Fitch* (5), was not overruled by *Bain v. Fothergill* (3), and that the latter case is not an authority for the application of *Flureau v. Thornhill* (1), "to the case of a vendor who can make a good title but will not, or will not do what he can do and ought to do in order to obtain one," a provision which seems exactly to describe the present case. The same view seems also to have been taken in *Jones v. Gardiner* (6). Consequently I hold that the rule laid down in *Flureau v. Thornhill* (1), and re-stated in *Bain v. Fothergill* (3), does not apply to the present case, and that the fifth issue must be answered in favour of the plaintiff.

I must point out that, as has been brought to my notice, it has been held in the Bombay High Court that the ruling in *Bain v. Fothergill* (3), does not apply to India; and that there is no exception to the rule provided by section 73 of the Contract Act: see *Ranchhod v. Manmohandas* (7), which follows the opinion expressed in the Note to s. 73 in Pollock and Mulla's edition of the Contract Act, but differs from the decision in *Pitamber Sundarji v. Cassibai* (8). The case before me has not been argued on this point and it is unnecessary that I should decide it, but I am by no means prepared to say that I differ from the decision in the later case.

The question then arises what is the proper measure of damages? As to this the defendants admit that they must repay the Rs. 501 paid as part of the purchase-money at the time of the execution of the contract. The plaintiff contends

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(1) (1776) 2 W. Bl. 1078.

(2) (1826) 6 B. & C. 31.

(3) (1874) L. R. 7 E. & I. App. 158.

(4) [1899] 2 Ch. 320.

(5) (1869) L. R. 4 Q. B. 659.

(6) [1902] 1 Ch. 195.

(7) (1907) I. L. R. 32 Bom. 165.

(8) (1886) I. L. R. 11 Bom. 271.

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that he is further entitled to recover Rs. 10,014-3-1 the difference between what he was bound to pay further under the contract, viz., Rs. 18,380-2-4 and Rs. 28,394-5-5 the amount which the defendant has admittedly received in the land acquisition proceedings in respect of his half share in the property in question. The defendants admit their liability on my findings for the difference between Rs. 18,380-2-4 and Rs. 24,690-11-6 the amount at which their share in the land was valued in the proceedings, apart from the 15 per cent. allowed for compulsory sale, that is Rs. 6,310-9-2; but deny liability for the profit they receive in respect of the compulsory sale. On this point I think they must succeed. The plaintiff is entitled to be put as far as possible in the position he would have been in if the contract had been carried out on the day when it was broken, as on that day his rights under the contracts were converted into a right for pecuniary compensation. On the pleadings and on the evidence on the record, I consider that the breach occurred on the date when the contract ought to have been, but was not performed. That date was the 15th January 1909. It was, of course, open to the plaintiff to waive his rights and to demand performance of the contract in spite of the breach, and this he may be taken to have done up to the 5th April the date assigned in the plaint for the arising of the cause of action: but I know of no authority for saying that he had power to postpone the breach of the contract as it was argued before me that he could, so far as to postpone its date till the 18th September when he demanded a conveyance for the last time. If we suppose the breach to have occurred either on the 15th January or the 5th April there can have been no question of the land being compulsorily acquired then, as the declaration in the land-acquisition proceedings was not made till the 23rd April, and there is nothing to show that either party contemplated a compulsory acquisition before the date. The plaintiff has contended that the case is covered by the principles of English Law laid down in *Williams on Vendor and Purchaser*, p. 40, rule 8, and that I

must give such force as I can to the principle that from the date of the contract for sale the land in equity belongs to the purchaser, and that he is, therefore, entitled to the increased value given to the land by the land-acquisition proceedings. But this overlooks the fact that the contract in this case has been broken, and that the question of damages is the only one for me to consider. Also I am not prepared to hold that there is room for any principle derived from equity in the application of s. 55 of the Transfer of Property Act.

The result is that I find in favour of the plaintiff who is entitled to the sum of Rs. 501 which he has already paid to the defendant as purchase-money, and to Rs. 6,310-9-2, as damages for the breach of the contract. He is also entitled to costs on Scale No. 2.

J. C.

Judgment for plaintiff.

Attorneys for the plaintiff: *Newgi & Mukerjee.*

Attorneys for the defendants: *B. N. Basu & Co.*

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Feb. 10, 14.

BHAGABATI BARMANYA

v.

KALICHARAN SINGH.

[On appeal from the High Court at Fort William in Bengal.]*Hindu Law—Will—Construction of Will—Bequest to a Class—Persons not born at death of testator—Intention of testator.*

The will of a Hindu testator without issue, after giving his wife and his mother possession of his property moveable and immoveable for their lives, contained the following clause. "On the death of my mother and my wife the sons of my sisters, that is to say, their sons who are now in existence as also those who may be born hereafter shall in equal shares hold the said properties in possession and enjoyment by right of inheritance, and shall maintain intact and continue the service of the established deities and ancestral rites according to the practice heretofore obtaining." The testator died the day following the execution of the will.

Held (affirming the decision of the High Court), that the intention was not to declare that the sisters' sons had a "right of inheritance," but to give them under the will a vested interest in their respective shares at the testator's death, though postponing their possession and enjoyment until the deaths of the mother and widow.

Assuming that the testator's intention was that all his nephews, whether then in existence or after born should take, there was a valid bequest to such of them as were capable of taking at his death, notwithstanding that others of the class were incapacitated from taking because not then born.

Ram Lal Sett v. Kanai Lal Sett (1) upheld and approved, as laying down the general rule of construction applicable to Hindu wills in the case of such a bequest where there is no other objection to it.

Dias v. De Livera (2) referred to as stating a convenient rule to apply to wills of Hindus, that a gift to children not in existence at the date of the gift should be limited to those born between the date of the will and the death of the testator.

APPEAL from a judgment and decree (1st June 1905) of the High Court at Calcutta, which dismissed an appeal from

* *Present*: LORD MACNAGHTEN, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.

(1) (1886) I. L. R. 12 Calc. 663. (2) (1879) L. R. 5 A. C. 123.

a decree (24th April 1903) of the District Judge of Murshidabad.

The defendants were the appellants to His Majesty in Council.

The question for determination in this appeal was as to the true construction of the will of one Ram Lal Singh, which was executed on 2nd March 1868.

The facts and the material portions of the will are set out in the report of the case before the High Court (SIR FRANCIS W. MACLEAN C.J., and GHOSE, HARRINGTON, MITRA and GEIDT JJ.) which will be found in I. L. R. 32 Calc. 992.

On this appeal,

Sir R. Finlay, K.C., and *Ross*, for the appellants, contended that there was no devise to the nephew, the intention of the testator being, it was submitted, that they should take "by right of inheritance," after the death of the survivor of his widow and his mother; and that the clause of the will to be construed contained a declaration to that effect. There was nothing, on the proper construction of the will, which gave the sisters' sons, or any of them, a vested interest in the estate on the death of the testator. But, assuming that there was a devise to the nephews, and the intention was that they should all take under it, those "now in existence as also those who may be born hereafter," it was a bequest to a class some of whom were not in existence at the testator's death, and was therefore void in its entirety. On this point there was a conflict of decision in India the earlier cases following the rule in the English case of *Leake v. Robinson* (1), which was followed in *Pearks v. Moseley* (2); and the later cases following the principle laid down in *Rai Bishen Chand v. Asmaida Koer* (3), and *Ram Lal Sett v. Kanai Lal Sett* (4). Of the cases in which such a bequest was held to be wholly void were cited *Bramamayi Dasi v. Joges Chandra Dutt* (5);

(1) (1817) 2 Mer. 364.

(4) (1886) I. L. R. 12 Calc. 663.

(2) (1880) L. R. 5 A. C. 714.

(5) (1871) 8 B. L. R. 400, 410.

(3) (1883) I. L. R. 6 All. 560;

L. R. 11 I. A. 164.

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Soudamoney Dassee v. Jogesh Chandra Dutt (1); *Kherode-money Dassee v. Doorgamoney Dassee* (2); *Rajomoyee Dassee v. Troylukhomohiney Dassee* (3); and *Jairam Narronji v. Kueerbai* (4); whilst of those which decided that the bequest was good as to those of the class who were in existence at the time the gift took effect, reference was made to *Javerbai v. Kablibai* (5); *Manjamma v. Padmanabhayya* (6); *Man-galdas Parmanandas v. Tribhuvandas Narsidas* (7); *Tribhuvandas Ruttonji Mody v. Gangadas Tricumji* (8); *Krish-narao Ramchandra v. Benabai* (9); *Khimji Jairam Narronji v. Morarji Jairam Narronji* (10); *Bhoba Tarini Debya v. Peary Lall Sanyal* (11); *Gordhandas Soonderdas v. Bai Ram-coover* (12); and *Advocate-General v. Karmali Rahimbhai* (13). Mayne's Hindu Law, 7th Ed., pages 503, 504, 505, section 382. The Succession Act (X of 1865) sections 100, 101, 102; and the Transfer of Property Act (IV of 1882), sections 13, 14, 15 were referred to, the sections of the Acts (though not applicable to the present case) being cited by way of illustration as to what was intended to be the rule in India as to bequests to persons not in existence [*DeGruyther, K.C.*, referred to *Fell v. Biddolph* (14).]

DeGruyther, K.C., and *B. Dube*, for the respondents, were not heard.

Feb. 14.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a judgment of the Calcutta High Court delivered by Maclean, C.J., affirming a decree of the District Judge of Murshidabad.

The question turns upon the meaning and effect of the will of a Hindu gentleman named Ram Lal Singh. The

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| (1) (1877) I. L. R. 2 Cal. 262. | (8) (1893) I. L. R. 18 Bom. 7. |
| (2) (1878) I. L. R. 4 Cal. 455 | (9) (1895) I. L. R. 20 Bom. 571. |
| (3) (1901) I. L. R. 29 Cal. 260. | (10) (1897) I. L. R. 22 Bom. 533. |
| (4) (1885) I. L. R. 9 Bom. 491, 508. | (11) (1897) I. L. R. 24 Cal. 616. |
| (5) (1890) I. L. R. 15 Bom. 326. | (12) (1901) I. L. R. 26 Bom. 449. |
| (6) (1889) I. L. R. 12 Mad. 393. | (13) (1903) I.L.R.29 Bom.133, 150. |
| (7) (1891) I. L. R. 15 Bom. 652. | (14) (1875) L. R. 10 C. P. 701. |

will was executed on the 2nd of March 1868. The testator died on the following day.

At the date of the will the state of the testator's family was this. The testator had no issue. His mother and his wife were alive and he had four sisters living. Two were childless widows. The other two had male offsprings.

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The will, so far as material, is in the following terms:—

“My mother, Phudan Kumari Barmanya, and my wife, Bhagabati Barmanya, shall, as long as they live, hold possession of all my properties, movable and immovable, and enjoy and possess the same on payment of the collectorate revenue and the zemindars' rents, and by maintaining intact and continuing the service of the established deities and the ancestral rites according to the practice heretofore obtaining, and shall pay off my debts and realise my dues. They shall not be competent in any way to transfer the immovable property to any one. On the death of my mother and my wife, the sons of my sisters, Golap Sundari Barmanya and Annapurna Barmanya, that is to say, their sons who are now in existence, as also those who may be born hereafter, shall, in equal shares, hold the said properties in possession and enjoyment by right of inheritance, and shall maintain intact and continue the service of the established deities and the ancestral rites according to the practice heretofore obtaining.”

The difficulty, so far as there is any difficulty in construing the will, is occasioned by the bequest to the after born sons of the testator's two sisters, which has been taken to include nephews born after the testator's death. It may perhaps be doubted whether the will properly construed gives rise to the question on which so much argument has been expended. If an English will expressed in similar terms were before an English Court it would probably be held that the gift to after born children was confined to children coming into existence between the date of the will and the testator's death. There is nothing in the circumstances in which this will was made though the testator died the next day to render that view improbable, for he expressly provides that if he recovers the will shall hold good unless altered. “The real doctrine of the Court,” says Wood, V.C., in *Mann v. Thompson* (1):

“Is, that when children are mentioned in a will, that means *prima facie*, if no intervening interest be given, that which is considered to

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be the testator's meaning in the case of a gift to individuals, namely, those who may be living at the death of the testator. If the gift be not immediate, it may be that he intends to include all those children who may be living at the time of distribution; and the Court judges of the intention in this respect from the whole scope of the will."

The rule is not altered by the addition of words of futurity as if the gift be to children "born and to be born" or to children "begotten and to be begotten." In accordance with this rule a gift expressed to be to a daughter and her husband and "their child now existing and also the other children which may hereafter be procreated" was held by this Board to be limited to children born between the date of the will and the testator's death: *Davis v. De Livera* (1). The fact that this rule is a rule of convenience is some reason for applying it to Hindu wills, and an additional reason may be found in the well-known doctrine of Hindu law that a gift to an object not in existence is absolutely void. But however this may be, it has been assumed throughout that the testator intended children born after his death to be included in the gift. And their Lordships propose to deal with the case on that assumption.

It will be convenient at the outset to dispose of a point suggested by the words "by right of inheritance." It was said that there was really no bequest in favour of the nephews, and that so far as they were concerned the will only declared a right of inheritance. The High Court had no difficulty in rejecting that contention, and their Lordships are of the same opinion. It is not very easy to determine the proper meaning of the expression translated by the words "by right of inheritance." The learned Chief Justice explains that the literal translation should be "as after-takers," and he adds that "it may be that the testator used the expression in the sense that the nephews would take with the same incidents of proprietorship as heirs would." Whatever the exact meaning of this doubtful expression may be, it cannot in their Lordships' opinion have been inserted for the

purpose of rendering meaningless words which had only just been used.

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Apart from this point the learned counsel for the appellant argued in the first place that there was no vesting until the death of the survivor of the mother and the widow. Their Lordships, however, think it is clear on the construction of this will that the nephews were intended to take a vested and transmissible interest on the death of the testator, though their possession and enjoyment were postponed. Whether it was the intention of the testator that on the birth of nephews after his death, interests vested should be divested so as to let in such after born nephews is another question.

It was contended in the second place (and this of course was the principal contention) that the gift including, as it did, a gift to persons not in existence at the time of the testator's death was altogether void.

Upon this question there has been, as the learned Chief Justice observes, a conflict of judicial opinion in India. But in their Lordships' opinion the question was set at rest for all practical purposes by the judgment of Wilson, J., as he then was, in the case of *Ram Lall Sett v. Kanai Lal Sett* (1), in 1886.

In that case the learned Judge disposed of the cases which had been treated in India as authority for introducing into the construction of Hindu wills the rule commonly referred to as the rule in *Leake v. Robinson* (2). He showed that the rule was introduced into India owing to a mistaken analogy, and at the end of a judgment which leaves nothing more to be said, he stated that he should be "prepared to hold, as the general rule, that where there is a gift to a class, some of whom are or may be incapacitated from taking because not born at the date of gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking."

(1) (1886) I. L. R. 12 Calc. 663. (2) (1817) 2 Mer. 363.

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In that conclusion their Lordships agree and they are glad to have this opportunity of expressing their entire concurrence in the judgment to which they have referred. It would serve no useful purpose to recapitulate the learned Judge's arguments. But there is one passage at page 678 to which their Lordships desire emphatically to call attention. It is this:—

"It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question."

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellants: *G. C. Farr.*

Solicitors for the respondent: *T. L. Wilson & Co.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

SAHEBJAN BEWA

v.

ANSARUDDIN.*

1911

March 1.

Mahomedan Law—Dower—Possession—Right of Widow to retain husband's property until dower debt is paid off.

Under the Mahomedan Law, when a widow is in possession of the undistributed property of her deceased husband, such possession having been obtained lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower debt is paid.

The possession need not necessarily be possession obtained by an agreement with her husband or his heirs.

Bibi Tasliman v. Bibi Kasiman (1) and *Amanat-un-nissa v. Bashir-un-nissa* (2) dissented from.

SECOND APPEAL by the defendant No. 1, Sahebjan Bewa.

This appeal arose out of an action brought by the plaintiff to recover possession of certain immoveable properties on a declaration of his title thereto. It appeared that one Sharafat died, leaving two widows, defendants Nos. 1 and 2, a son, now dead, by defendant No. 2, and two sons Askaruddin and Gyasuddin, by another wife who had predeceased him. He also left a nephew, the son of his brother, who is the plaintiff in the present suit. Subsequently Askaruddin died.

The plaintiff stated that defendant No. 2 sued for recovery of possession of her 5as., 13gds., 1c., 1kr., share, in the Court of the 2nd Munsif, Manickgunj, but during the pendency of the suit her son Hafizuddin died, leaving the defendant No. 1 and Gyasuddin as heirs; and on the death of Gyasuddin he

* Appeal from Appellate Decree, No. 2449 of 1908, against the decree of Tarak Chandra Das, Subordinate Judge of Dacca, dated Aug. 5, 1908, modifying the decree of Narendra Nath Chakravarti, Munsif of Manickgunj, dated July 31, 1907.

(1) (1910) 12 C. L. J. 584,

(2) (1894) I. L. R. 17 All. 77.

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being his sole heir brought this suit for recovery of possession of the share of the properties which Gyasuddin was entitled to.

Defendant No. 1 contended, *inter alia*, that the plaintiff was not entitled to recover possession of the property without paying off her dower to the extent of 200 rupees. Defendants Nos. 3, 6, 9 and 21 who appeared and who were usufructuary mortgagees contended that the plaintiff was bound to recognize their mortgages.

The Court of first instance decreed the plaintiff's suit with mesne-profits subject to a mortgage in favour of defendants Nos. 3 and 6, and also to payment of Rs. 141 and odd out of the dower debt due to the defendant No. 1 from her late husband. On appeal by the plaintiff, the Subordinate Judge held that the plaintiff was entitled to recover possession from the widow, without payment of the dower debt, and that the widow might claim her dower by way of set off if the plaintiff should hereafter sue her for recovery of mesne profits.

Against this decision the defendant No. 1 appealed to the High Court.

Babu Mukunda Nath Roy, for the appellant.

Dr. Sarat Chunder Bysack, for the respondent.

Cur. adv. vult.

MOOKERJEE AND TEUNON JJ. This is an appeal on behalf of the first defendant in a suit for recovery of possession of land. The subject matter of the dispute originally belonged to a Mahomedan by name Sarafat, who died about the year 1897. He left two widows, who are the first two defendants in the present suit, a son, now dead, by the second widow, and two sons by another wife who had predeceased him. He also left a nephew, the son of his brother, who is the plaintiff in the present action. After his death his property, after successive devolutions to the details of which reference is not necessary for our present purpose, vested in his son Saiduddin. Upon the death of the latter, the plaintiff sues to

recover possession of a two-thirds share by right of inheritance. The claim is resisted by the first widow as also by two usufructuary mortgagees, who have derived title from the heirs of the original owner. The first widow resists the claim on the ground that so long as her dower to the extent of two hundred rupees remains unpaid, she is entitled under the Mahomedan Law, to continue in possession. The Court of first instance found that the widow was entitled to the dower-debt, and made a conditional decree in favour of the plaintiff, that upon payment by him of a proportionate share thereof, he would recover possession. As regards the usufructuary mortgagees, the Court held that the plaintiff was bound to redeem them or to wait till the expiry of the term fixed in the mortgage instruments. Against this decree, the plaintiff appealed to the Subordinate Judge, who has affirmed the decree of the Original Court so far as the usufructuary mortgagees are concerned, but has varied it in so far as the widow is concerned. The Subordinate Judge has held that the plaintiff is entitled to recover possession from the widow without payment of the dower-debt, and that the widow might claim her dower by way of set off if the plaintiff should hereafter sue her for recovery of mesne profits. The widow has now appealed to this Court, and on her behalf it has been argued that the decree made by the Subordinate Judge is contrary to well-recognised principles of Mahomedan Law, and that the plaintiff is not entitled to recover possession from her till her dower-debt has been satisfied. In our opinion, this contention is well-founded and must prevail.

It cannot be disputed that under the Mahomedan Law when a widow is in possession of the undistributed property of her deceased husband, such possession having been obtained lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled as against the other heirs of her husband to retain such possession until her dower-debt is paid; but she must account to them for the profit received. This position is established by the decisions of the Judicial Committee in the cases of *Ameer-un-nissa v. Morad-*

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un-nissa (1) and *Bachun v. Hanid Hossein* (2). The same view has been uniformly adopted in this Court in the cases of *Woomatool Fatima v. Meerunmunnessa* (3), *Ahmed Hossain v. Khadeja* (4), *Bibee Tajein v. Syud Wahed Ali* (5), *Bakreedan v. Ummatul Fatima* (6), and *Umatul Mehdi v. Kulsum* (7). The cases of *Wahidunnissa v. Shubrattun* (8) and *Bazayet Hossein v. Doolichand* (9), do not militate against this view, as they are authorities merely for the proposition that a widow, though her dower remains unpaid, cannot follow the estate of her husband when it has passed into the hands of *bona fide* purchasers for value without notice of her claim. It has been contended, however, by the learned vakil for the plaintiff-respondent, upon the authority of the decision in *Bibi Tashliman v. Bibi Kasiman* (10), that the possession of the widow cannot be maintained as against the heirs, unless it is established that such possession was obtained by agreement with either her husband or his heirs. We are unable to adopt this view as a correct exposition of the law on the subject. The attention of the learned Judges who decided the case of *Bibi Tashliman v. Bibi Kasiman* (10), was drawn only to the case of *Amanatunnissa v. Bashirunnissa* (11); their attention does not appear to have been invited to the later decision in *Muhammad Karimullah v. Amani Begam* (12), where the contrary view adopted in *Amani v. Karimullah* (13) was affirmed. In our opinion, the effect of the decision in *Amanatunnissa v. Bashirunnissa* (11), is to fritter away the rule laid down by their Lordships of the Judicial Committee and we are in agreement with the weighty criticism on that case by Sir Roland Wilson in his valuable treatise on Anglo-Mahomedan Law, 3rd edition, section 162. It is worthy of note that the view

(1) (1855) 6 Moo. I. A. 211.

(2) (1871) 10 B. L. R. 45;

14 Moo. I. A. 377.

(3) (1868) 9 W. R. 318.

(4) (1868) 10 W. R. 369.

(5) (1874) 22 W. R. 118.

(6) (1905) 3 C. L. J. 541.

(7) (1907) I. L. R. 35 Calc. 120.

(8) (1870) 6 B. L. R. 54.

(9) (1878) I. L. R. 4 Calc. 402;

L. R. 5 I. A. 211.

(10) (1910) 12 C. L. J. 584.

(11) (1894) I. L. R. 17 All. 77.

(12) (1895) I. L. R. 17 All. 93.

(13) (1894) I. L. R. 16 All. 225.

taken in the case of *Amanatunnissa v. Bashirunnissa* (1), is not in agreement with the earlier decision in *Balund Khan v. Janee* (2), and that the decision in *Miran v. Najiban* (3), was disapproved in *Imdad Hossain v. Hossaine Bue* (4); consequently the decision in *Amiran v. Rahiman* (5), must also be taken to have been disapproved. In this divergence of judicial opinion amongst the learned Judges of the Agra and Allahabad High Courts, we must adhere to what has been recognised as the rule on the subject in this Court. It must further be observed that the limitation suggested would practically nullify the rule, for if a widow has got into possession by an agreement with her husband or his heirs, it is inconceivable how any case could come into Court for recovery of possession of the estate from her hands; in other words, to bring the case within the principle adopted by the Judicial Committee, namely, the possession of the widow to be maintained by a Court of Justice, must be possession lawfully obtained, without force or fraud, it need not necessarily be possession obtained by an agreement with her husband or with his heirs. We may add that the cases of *Mehrun v. Kubeerun* (6) and *Ali Muhammad Khan v. Azizulla Khan* (7), do not support the view taken in *Amanatunnissa v. Bashirunnissa* (1), because in the first of these cases, it does not appear that the widow had possession since her husband's death, and in the second, it was merely decided that the lien for dower claimed by the widow was personal to herself, and did not pass to a purchaser of the estate. The learned vakil for the respondent has, however, suggested that the possession of the widow in this case was not in her character as the widow of the original owner, entitled to realise her dower-debt from the income of the property, but was rather possession as heir or guardian of her infant step sons. This suggestion is ingenious, and does not appear to have been

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(1) (1894) I. L. R. 17 All. 77.

(2) (1870) 2 All. H. C. R. 319.

(3) (1867) 2 Agra H. C. R. 335.

(4) (1869) 2 All. H. C. R. 327.

(5) (1867) 2 Agra H. C. R. 362.

(6) (1870) 13 W. R. 49;

6 B. L. R. 60.

(7) (1883) I. L. R. 6 All. 50.

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made at any stage in the Court below; but there is no substance in it, because, so far as we are able to gather from the materials on the record, the widow came into possession upon the death of her husband, and there is no reason why her possession should not be attributed to her character as widow of the original owner. In any event, there is nothing in her conduct to shew that her possession was inconsistent with the character now claimed by her. The real controversy in the Original Court was whether she was entitled to get Rs. 200 or 10 rupees on account of dower, while the argument addressed to the Subordinate Judge was that upon no principle recognised by Mahomedan Law, could she claim to retain possession as against the heirs. The suggestion, therefore, put forward for the first time in this Court, does not carry any weight. The plaintiff claims not as the direct heir of the original owner but as the heir of persons who were heirs of the original owner and acquiesced in the possession of the estate by the widow. In our opinion, the principle laid down in the two decisions of the Judicial Committee to which we have referred is applicable to the present case, and the appellant is entitled to continue in possession till her dower-debt has been satisfied.

The only other question which requires consideration is as to the form of the decree. The Court of first instance, as we have stated, made a conditional decree for possession in favour of the plaintiff upon payment of a proportionate share of the dower-debt. The widow was satisfied with this decree and did not appeal against it. The plaintiff appealed and took up the extreme position with success that he was entitled to an unconditional decree for possession. That decree, the widow has now convinced us, cannot be maintained, and, therefore, we are bound to consider what decree should be made: *Parichat v. Zalim Singh* (1). At one stage of the arguments we were inclined to adopt the view that an account ought to be taken of the profits received by the defend-

ant from the share sought to be recovered by the plaintiff, that against such profits should be set off the interest upon the dower-debt and that then a decree in favour of the plaintiff should be made subject to the payment of the balance, if any, that may be found due to the widow. The suit, however, has not been so framed as it ought to have been according to the observations of Sir Barnes Peacock, C.J., in *Ahmed Hossein v. Khadeja* (1). The property is of small value; the plaintiff himself values it at Rs. 225. Consequently it is not an unreasonable assumption to make, as was made by Sir Barnes Peacock in the case of *Woomatool Fatima Begum v. Meerunmunnessa Khanum* (2), that the profits received by the widow may be set off against the interest on the dower-debt; in other words, it may reasonably be assumed for the purposes of this litigation, that if the widow had received her dower-debt immediately upon the death of her husband, she might have invested it in property which would have brought her approximately the same amount of profit that she has actually realised by possession of the property in dispute. In this view, she would be entitled to remain in possession till the principal amount of her dower-debt was paid to her, and this is in reality the decree which was made by the Court of first instance; that decree in this view is, on the whole, just and ought to be affirmed.

The result, therefore, is that this appeal is allowed, the decree of the Subordinate Judge set aside, and that of the Court of first instance restored. The appellant will have her costs from the plaintiff both here and in the Court of Appeal below.

Appeal allowed.

S. C. G.

(1) (1868) 10 W. R. 368.

(2) (1868) 9 W. R. 318.

APPELLATE CIVIL.

Before Mr. Justice Chitty and Mr. Justice Coxe.

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Feb. 14.

Execution of Decree—Attachment—Sale proclamation—Notice—Civil Procedure Code (Act V of 1908) o. XXI, rr. 57 66—"Default", meaning of.

On 20th February, 1909, an execution case, which could not proceed owing to the failure of the decree-holder to serve notice on the judgment-debtor as required by o. XXI, r. 66, of the Civil Procedure Code, 1908, was dismissed, the order concluding with these words:—"The execution case is accordingly dismissed, the properties will remain under attachment. Decree-holder will bear his own costs."

On 25th March, 1909, the decree-holder without issuing a fresh attachment again applied for sale of the property, and duly served the required notice. The judgment-debtor objected on the ground that there was no subsisting attachment.

Held, that this application must also be dismissed.

Held, *per* Chitty J., that the words of order XXI, rule 57, are imperative and the attachment on the property ceased by operation of law on the 20th February, 1909, and that the word "default" in that rule, cannot be given a restricted meaning so as to confine it to default in appearance, in the payment of process fees, or in production of documents, but must have its ordinary meaning, namely, failure to do what one is legally bound to do.

Held, *per* Coxe J., that under the Civil Procedure Code, 1882, the striking off of execution proceedings was capable of different interpretation in different circumstances, but order XXI, rule 57, was enacted to put a stop to the confusion. The application for execution having been dismissed the result specified in order XXI, rule 57, must necessarily follow.

Puddomonee Dossee v. Roy Muthooranath Chowdhry (1), *Biswa Sonan Chunder Gossyamy v. Binanda Chunder Dibingar Adhikar Gossyamy* (2), *Mohunt Bhagwan Ramanuj Das v. Khetter Moni Dassi* (3) referred to.

* Appeal from order, No. 55 of 1910, against the order of M. Yusuf, District Judge of Noakhali, dated Oct. 2, 1909, confirming the order of Kumud Kanta Sen, Munsif of Sudharam, dated Aug. 2, 1909.

(1) (1873) 20 W. R. 133.

(2) (1884) I. L. R. 10 Calc. 416.

(3) (1896) 1 C. W. N. 617.

APPEAL by the judgment-debtor, Namuna Bibi.

The facts of the case are set out in the judgment of Chitty J.

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Babu Hari Bhusan Mukerjee, for the appellants.

Babu Brajendranath Chatterjee, for the respondent.

Cur. adv. vult.

CHITTY J. This is an appeal by the judgment-debtor against an order of the lower Appellate Court affirming that of the Munsif in certain execution proceedings. The sole point for determination is whether at the date of the decree-holder's last application for sale, dated 25th March 1909, the property sought to be sold was under attachment.

The facts are as follows: In 1906, the decree-holder obtained a money decree against the judgment-debtor and, in execution attached and advertised for sale the taluk now in question. The judgment-debtor raised objections and proceedings took place which delayed matters for two years. It is unnecessary to particularise those proceedings as they have no bearing on the present case. On 4th April 1908, the decree-holder again applied for execution and asked for sale of the taluk (Execution Case, No. 464 of 1908). The judgment-debtor raised an objection that there was no subsisting attachment. This question was fought out in Miscellaneous Case, No. 190 of 1908, and both in the Court of first instance and the Appellate Court, the decision was against the judgment-debtor. The decree-holder then took further steps and a fresh sale proclamation was issued. The judgment-debtor again objected and his objection gave rise to Miscellaneous Case, No. 287 of 1908, which was eventually dismissed. On 2nd January 1909, we find this order in Execution Case, No. 464 of 1908 "Miscellaneous Case, No. 287 of 1908, has been dismissed for default. Issue sale proclamation on the property attached, fixing 15th February for sale. Decree-holder to file talabana and written process at once." On 15th February 1909, we find the order "Put up for sale after the sale (?".

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work) of Judges and other Courts are over" and on 17th February 1909, "Decree-holder is permitted to bid at sale up to the decretal amount as prayed for."

Then on 20th February 1909 comes the order on the effect of which the determination of this appeal depends.

It runs as follows:—"The judgment-debtor and the incumbrancer have filed two petitions of objections. Several points have been urged, but the most important is that no notice was served on the judgment-debtor in accordance with the provisions of rule 66 of order XXI of the new Code before settling the terms of the sale proclamation. It appears that the sale proclamation was drawn up on the 6th January. The new Act came into force on the 1st idem. The sale must therefore be stayed as the sale cannot take place on the proclamation now issued. The pleader for the decree-holder consents he will file a fresh application for execution and this case which has been pending for a long time may be dismissed. The Execution Case is accordingly dismissed. The properties will remain under attachment. Decree-holder will bear his own costs."

Acting in compliance with that order and in pursuance of his intention expressed on 20th February 1909, the decree-holder again on 25th March 1909 applied for sale of the property after issue of the necessary sale proclamation. On this occasion notice under order XXI, rule 66, was duly served and the judgment-debtor came in and shewed cause, alleging that there was no subsisting attachment, it having ceased on 20th February 1909 by operation of law under the provisions of order XXI, rule 57, when the previous Execution Case was dismissed.

Both the Courts below have decided against the judgment-debtor. The Munsif holds that the rule has no application, (i) because default means only default in appearance, or in payment of fees or in putting in documents, and that there was no such default in this case; (ii) there is nothing to prevent a Court from keeping an attachment in force, except in a case dismissed for default; (iii) the Court did not intend

to "kill" this application; and (iv) that an attachment not expressly abandoned or withdrawn subsists.

The Subordinate Judge as I read his judgment held that there was no default on the part of the decree-holder. He says that the Munsif evidently suggested the order of dismissal, which was accepted by the decree-holder, and that it would be unfair to make the decree-holder "responsible for the Court's suggestion, to which he bowed down simply out of respect." Now there can be no doubt whatever that the only obstacle to the Court's proceeding further with the application for execution in January and February 1909 was that the requisite notice under order XXI, rule 66, had not been issued or served on the judgment-debtor. It appears equally clear that it was the duty of the decree-holder to apply for such notice and take the necessary steps to have it served upon the judgment-debtor. Not having done so, the decree-holder was in default, and it was this default that prevented the Court from proceeding with the execution on 20th February 1909. I can see no reason for giving a restricted meaning to the word 'default' in order XXI, rule 57, that is, to confine it to default in appearance, in the payment of process fees, or in production of documents. It must, I think, have its ordinary meaning, namely, failure to do what one is legally bound to do.

If this be the view taken, the matter admits of no doubt. The words of order XXI, rule 57, are explicit and imperative; "Upon the dismissal of such application the attachment shall cease." It is not open to the Courts to consider what the Judge or the parties intended. The Judge, no doubt, intended to continue the attachment for he said so in so many words. No intention, however, of the Judge or the parties, nor any such order of the Judge can override the express provision of the law that upon the dismissal the attachment shall cease. The Judge might, if he had thought fit, have adjourned the application. He was, however, unwilling to do so, as the case had been long pending. The decree-holder appears to have admitted his default, for he not only acquiesced in the dismissal

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sal but consented to pay all the costs. It is no excuse to say, as has been contended here, that the new Code of Civil Procedure had only just come into force and the Court and the parties were therefore not well acquainted with its provisions. The ignorance of a law whether new or old is no excuse. I am of opinion that the attachment had ceased by operation of law on 20th February 1909 and that the decree-holder could not proceed further in execution without again placing the property under attachment. Some attempt was made to argue that no second appeal lay in this case, but the learned pleader confessed that he did so with diffidence. It is clear that it is a question between the parties in execution under section 47, Civil Procedure Code, and that an appeal lies. I would accordingly set aside the orders of the lower Appellate Court and the Court of first instance, and allow the petitioner's objections to execution with costs in all the Courts.

It has been stated at the Bar that the property in question in this matter has actually been sold by the Courts and, possession given to the purchaser. With that we have nothing to do. We can only correct the orders which are before us on appeal and leave the parties to take such further action as they may be advised.

COXE J. I need not recapitulate the facts, which are set out in the judgment of my learned Colleague. On those facts I feel compelled to agree that order XXI, rule 57, is fatal to the decree-holder respondent's case. Under the former Code the striking off of execution proceedings was capable of different interpretations in different circumstances [*Puddomonee Dossee v. Roy Muthooranath Chowdhry* (1)] and led to much uncertainty and confusion. In *Biswa Sonan Chunder Gossyamy v. Binanda Chunder Dibingar Adhikar Gossyamy* (2), Field J. commented on the evils of the practice and remarked that it would be very desirable if Courts in the moffusil were to abandon it. And the confusion caused by the

(1) (1873) 20 W. R. 133.

(2) (1884) I. L. R. 10 Calc. 416.

practice arose as well in cases dismissed as in those that were merely struck off: *Mohunt Bhagwan Ramanuj Das v. Khetter Moni Dassi* (1). It was doubtless to put a stop to this confusion that the Legislature enacted rule 57, and I think it is impossible for us in the first case that arises under the rule to weaken its effect and limit its operation. It may be that in this particular case hardship and injustice may be caused. It is clear that the Court as well as the parties, on the 20th February 1909, agreed that the attachment should continue and that the decree-holder should have further time to file the sale proclamation. The Court, which should always be vigilant not to allow its own act to do wrong to a suitor [*Syud Tuffuzzool Hossein Khan v. Rughoonath Pershad* (2)], seems to have lulled the decree-holder into a false security and to have let him understand that in despite of rule 57 and in despite of the dismissal of his application his attachment would still subsist and he would still have further time allowed him. I appreciate fully the arguments of the lower Courts and their reluctance to let the oversight of the Court work injustice. But the words of the rule are quite clear and the present case certainly comes under them. The Munsif was unable to proceed with the execution on the 20th February because no notice had been served on the judgment-debtor, and no notice had been served because the decree-holder had made no application for the issue of such a notice. That omission of his certainly seems to me to have been a default on his part. The Munsif could have adjourned the case but he did not do so. He dismissed it, and the results specified in rule 57 must necessarily follow. That may involve injustice in this particular case, but the law must be observed and it is perhaps better that hardship should be caused in one case than that a door should be opened to the return of all the uncertainty that rule 57 was intended to do away with.

S. A. A. A.

Appeal allowed.

(1) (1896) 1 C. W. N. 617.

(2) (1871) 14 Moo. I. A. 40.

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CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

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ISHAN CHANDRA BHUTT

v.

EMPEROR.*

Mukhtear—Authority to practise in the Courts of Magistrates and Sessions Judges—Limitation of authority—Necessity of permission of the Court in each particular case—Grounds of permission—Criminal Procedure Code (Act V of 1898) ss. 4 (r.), 340.—Practice.

Under ss. 4 (r) and 340 of the Criminal Procedure Code, a mukhtear is, subject to the permission of the Court in each particular case, authorised to practise both before Magistrates and Sessions Judges.

There is no general rule that mukhteers should be allowed to appear in every case in the Courts of Magistrates, and that they should not be permitted to appear in any case in the Courts of Session. The Magistrate and the Judge must decide in each case whether he will permit a mukhtear to appear.

Though it is not desirable that mukhteers should be permitted to appear in Sessions Courts where their appearance is unnecessary, or where there is no reason for their appearance, the question is one which must be decided independently in each case, and no general rule can be laid down. It depends largely on whether the accused is in a position to employ a vakil or pleader and whether he elects to do so. But the defence of an accused should not be shut out merely by the fact that he is represented by a mukhtear.

THE petitioner was tried before Moulvi Abu Nasir Mahomed Ali, Deputy Magistrate of Mymensingh, under s. 325 of the Penal Code, and convicted and sentenced, on the 11th October 1910, to one day's simple imprisonment and a fine. An appeal, which was almost time-barred, was thereupon verbally presented to the Sessions Judge of Mymensingh, against the Magistrate's order by Brojo Gopal Bose, a duly certificated mukhtear who was, under the terms of his certificate, authorised to practise in all the Civil and Criminal

* Criminal Revision, No. 13 of 1911, against the order of H. Walmsley, Sessions Judge of Mymensingh, dated Nov. 26, 1910.

Courts subordinate to the High Court except the Calcutta Small Cause Court. The learned Judge passed an order that, as it was not the practice for mukhtears to present appeals or to plead in his Court, he would, before admitting the appeal, hear the representatives of the pleaders and mukhtears. Accordingly, on the 24th November, he heard Brojo Gopal Bose for the mukhtears and the Government Pleader on behalf of the pleaders, and dismissed the appeal summarily, on the 26th, in the following terms:—

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On the 24th instant I heard a senior mukhtear on behalf of the mukhtears, and the Government Pleader on behalf of the pleaders. The question for decision is whether mukhtears should be allowed to present criminal appeals, and practise generally in the Court of the Sessions Judge. My attention has been drawn to some of the earlier enactments about legal practitioners, but it is not necessary to discuss them. The law as to the appearance of mukhtears in Courts of all descriptions is contained in section 4 (r) of the Criminal Procedure Code. Mukhtears may appear with the permission of the Court.

Now in this district, and in all districts of which I have had experience, mukhtears habitually practise in the Courts of Magistrates without let or hindrance, but they do not attempt to practise in the Judge's Court. Before Magistrates the possession of a certificate, renewed annually, seems to be regarded as entitling mukhtears to practise without further permission, and I think the custom is a very good one. But it is quite another matter when the mukhtears want to practise, as of right, in Courts of a superior grade. The law does not give them this right. The ruling of the Allahabad High Court in I. L. R. 30 All. 66 does not help them. A later case, not yet reported, except in certain newspapers, seems to go further, but it may turn largely upon special features which have not been fully set out. I hold, therefore, that mukhtears cannot practise in this Court, as of right. With regard to the matter of permitting them to appear, I must bear in mind that there are here in Mymensingh very many pleaders who have qualified themselves by passing a more severe examination than the mukhtears.

These pleaders are, as they should be, better able than the mukhtears to assist the Court in the administration of justice, and it is most undesirable that a lower grade of practitioners should be admitted indiscriminately to compete with them. The number of pleaders is so great that their fees can rarely be prohibitive.

My attitude, therefore, is that mukhtears are not welcome in this Court.

I cannot assent to their proposition that all mukhtears are entitled to permission to appear in this Court until I know something against them. What I shall have regard to is the circumstances of the case in which a mukhtear wishes to appear; if he can satisfy me that for financial reasons, or for any other special cause, it is necessary to his client's

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interest that a mukhtear should appear, and not a pleader, I shall grant permission, but not otherwise.

In the present instance it is not pretended that there was any reason why a mukhtear should appear: the appeal was merely a peg for the question I have discussed. The appeal is dismissed summarily.

The petitioner, thereupon, obtained the present Rule on the ground set forth in the judgment of the High Court.

Mr. Sinha, Babu Harendra Nath Mitter and Babu Bhudeb Chunder Roy, for the petitioners.

Mr. Chakravarti, The Deputy Legal Remembrancer (Mr. Orr), Babu Dwarka Nath Chackerbutty and Babu Akhil Bandhu Guha, for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate to show cause why the appeal should not be reheard on the ground that a mukhtear has a right to appear for the defence of an accused person in any mofussil Court.

The issue of this Rule appears to have raised a general question between vakils and pleaders and mukhteers as to the right of the latter to appear in criminal cases. It was never intended that such a question should be raised, and the question is obviously one which has been disposed of by the terms of the law and by the High Court Rules. The law is contained in section 340 of the Criminal Procedure Code read with section 4, clause (r) of the same Code. Every person accused before any Criminal Court may of right be defended by a pleader, and "pleader" in this connection includes any mukhtear or other person appointed with the permission of the Court to act in such proceeding.

This particular practitioner has a 15-rupee license entitling him to practise as a mukhtear in all Civil and Criminal Courts subordinate to the High Court, except the Calcutta Small Cause Court. It is, therefore, clear that, subject to the permission of the Criminal Courts in each case, (and this applies equally to the Sessions Judge and the Magistrate) he is authorised to practise.

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What we intended in issuing the Rule was to emphasize the position that an accused person having the right to be defended by the class of persons enumerated in section 4 clause (r), it could rarely be a wise discretion on the part of the Sessions Judge or the Magistrate to refuse permission to a mukhtear appearing for the defence. That appears to be the tenor of the rules which have been laid down by this Court for the guidance of Magistrates; and, as the certificate is the same for both the Sessions Judge's Court and the Magistrate's, we presume that the rules laid down for Magistrates are equally applicable to Sessions Judges. "The terms of section 340 do not warrant any general rule for the exclusion of mukhteers in all cases, but only allow the exercise by Magistrates of a discretion in each case as it arises. The Magistrates are expected not to deprive parties of legal aid which they could frequently obtain at a moderate cost by indiscriminate exclusion of persons who are invested by law with a distinct professional status in criminal trials. Every Magistrate is bound, in each case that comes before him, to use the discretion vested in him by law before giving audience to an uncertified pleader, and in deciding whether permission should be given or not, the character of the person appointed to plead is one of the matters to be taken into consideration."

It has been urged before us by the learned counsel in showing cause against the Rule that, if this latter rule is applied in practice, the result would be that no mukhtear can be excluded on either side except on personal grounds, and this will result in their being admitted to universal practice.

In the first place we have to point out that this rule does not apply to mukhteers but to uncertified pleaders. Under section 4, clause (r), a mukhtear is a certified pleader when he obtains the permission of the Court to appear in any particular case.

We quite agree with the learned Judge that mukhteers should not be permitted to appear in the Sessions Court where their appearance is unnecessary, or where there is no reason for their appearance. But that is a matter which must be

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decided independently in every case, and no general rule can be issued. The learned Judge seems to have discussed the matter from the point of view of general practice. He has laid down that, as a general practice, mukhtears should be allowed to appear in every case in Magistrates' Courts as they do now, and that, as a general practice, they should not be allowed in any case to appear in the Sessions Court. Those general rules are both of them equally erroneous. The Magistrate has to decide in every case whether he will permit a mukhtear to appear; and the Sessions Judge has to decide in every case whether he will permit a mukhtear to appear, and we think that it is very difficult to exclude a qualified practitioner when he appears for the defence of an accused person, and that is all that we desired to put forward when we issued this Rule.

It is not competent to the Court below to say that this matter was merely put forward to test the right of mukhtears inasmuch as the appeal was almost out of time. The fact that the appeal was almost out of time, may have been the very reason for employing the very first practitioner that came to hand, namely, a mukhtear, there being nothing against the appearance of the mukhtear in this particular case. We think that the Rule should be made absolute, and that the appeal should be re-heard. Of course, the learned Sessions Judge may still exercise his discretion at the hearing of the appeal, and may permit a mukhtear to argue it, but that will largely depend upon the question whether the accused person is in a position to employ a vakil or pleader and whether he elects to do so. All we are anxious to avoid is that the defence of an accused person may not be shut out merely by the fact that he is represented by a mukhtear. The Rule is, therefore, made absolute and there will be a re-hearing of the appeal.

Rule absolute.

E. H. M.

ORIGINAL CIVIL.

Before Mr. Justice Stephen.

TRIPURA CHARAN BANNERJEE

v.

HARIMATI DASSI.*

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Feb. 21.*Hindu Law—Succession—Prostitute's estate—Stridhan—Severance as effect of degradation—Succession to property of degraded woman.*

The absolute property of a Hindu prostitute is to be treated as her *stridhan* for the purposes of succession. So far as succession is concerned, the degradation suffered by prostitution severs a woman from her natural relations at the moment she becomes degraded, but not from her sons or chaste daughters born after degradation.

In the goods of Kamineymoney Bewah (1), *Sarnamoyee Bewa v. Secretary of State for India* (2), *Bhutnath Mondol v. Secretary of State for India* (3), *Narasanna v. Gangu* (4) followed.

Taramunnee Dasse v. Motee Bunecanwe (5), *Sirasangu v. Minal* (6) approved and distinguished.

Sundari Dassi v. Nemye Charan Daw (7), *Subbaraya Pillai v. Ramasami Pillai* (8), *Narain Das v. Tirlok Tivari* (9) not followed.

ORIGINAL SUIT.

A Hindu prostitute, named Sreemutty Sowdamini Dassi died intestate in the month of December 1907, leaving two sons Nagendra Nath Das and Jatindra Nath Das, and four daughters Harimati Dassi, Kristo Dassi, Shobo Dassi, and Doorga Dassi. Jatindra Nath Das and the three last named daughters were still infants at the date of suit, Harimati Dassi being an adult and married. The deceased woman, who left certain immoveable property in Calcutta, was the daughter of a prostitute, and there was no evidence of her ever

* Original Civil Suit, No. 527 of 1909.

- (1) (1894) I. L. R. 21 Calc. 697. (5) (1846) S. D. A. 297.
 (2) (1897) I. L. R. 25 Calc. 254. (6) (1889) I. L. R. 12 Mad. 277.
 (3) (1906) 10 C. W. N. 1085. (7) (1907) 6 C. L. J. 372.
 (4) (1889) I. L. R. 13 Mad. 133. (8) (1899) I. L. R. 23 Mad. 171.
 (9) (1906) I. L. R. 29 All. 4.

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having been married. Further, there was evidence of some of Sowdamini's daughters also being prostitutes. The property in question had been acquired by Sowdamini by purchase, but there was no direct evidence as to how the purchase-money had been acquired, though the probabilities were that it represented part of the earnings of her trade. Nagendra Nath Das sold an undivided one-sixth share in the property as belonging to himself by inheritance from his mother, to the plaintiff for the sum of Rs. 500 and a conveyance was duly executed on the 23rd September 1908.

Thereafter the plaintiff called upon the children of Sowdamini, other than Nagendra Nath, to come to a partition of the property and on their failure to do so, brought this action against Harimati Dassi and the four infant children of Sowdamini, for a declaration of his title to a one-sixth share, for partition and incidental relief.

It was contended by the adult defendant, that inasmuch as Sowdamini was a prostitute, and living the life of a prostitute at the time of Nagendra Nath's birth, he inherited nothing from his mother. It was alleged that the property in fact belonged to the adult defendant, Sowdamini being her benamidar, but this plea was abandoned at the trial.

Mr. B. L. Mitter, for the plaintiff. The property of a Hindu prostitute, acquired with the earnings of her trade must be regarded as her *stridhan* and falls within the third category stated in Bannerjee's Marriage and Stridhan, 2nd edition, p. 398. It is her absolute property: Dayabhaga, Chap. IV, section I. Such property devolves on the woman's sons and unmarried daughters in equal shares. The fact of the woman being a prostitute makes no difference: there is heritable blood between a prostitute and her children. In spite of degradation, the woman remains a Hindu and the ordinary Hindu law of succession applies. Reliance was placed on *Mayna Bai v. Uttaram* (1), *Narayana v. Krishna* (2), *Dakhina Kali Debi v.*

(1) (1864) 2 Mad. H. C. 196.

(2) (1884) I. L. R. 8 Mad. 214.

Jagadishwar Bhattacharjee (1), *Sarnamoyee Bewa v. Secretary of State for India* (2), *Narain Das v. Tirlok Tiwari* (3), *Sundari Dassi v. Nemye Charan Daw* (4).

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Mr. Sircar, for the defendant. The onus lay on the plaintiff to establish that the property was *stridhan* and it has not been discharged: *Chunder Monce Dossee v. Joy Kissen Sircar* (5), *Bissessur Chuckerbutty v. Ram Joy Mojomdar* (6), *Brojo Mohun Mytee v. Mussamut Radha Koomaree* (7). Property acquired through prostitution cannot be regarded as *stridhan*. It follows the character of the fund. The status of a married woman is essential for the acquisition of *stridhan*. If the property is held to be *stridhan*, then, it is submitted, the daughters of a prostitute inherit in preference to her sons. The balance of authority is in favour of the proposition that the family tie is dissolved by prostitution, as distinguished from unchastity. Prostitution degrades a woman and severs all connection between her and the undegraded members of her family. It follows that Nagendra Nath was no heir to Sowdamini. Reliance was placed on *Taramunee Dassee v. Motee Buneeanee* (8), *Narasanna v. Gangu* (9), *Arunagiri Mudali v. Ranganayaki Ammal* (10), *In the goods of Kamineymoney Bewah* (11), *Sarnamoyee Bewa v. Secretary of State for India* (2), and the judgment of Woodroffe, J. in *Bhutnath Mondol v. Secretary of State for India* (12).

Mr. B. L. Mitter, in reply.

Cur. adv. vult.

STEPHEN J. The plaintiff in this case sues for a declaration that he is entitled to a one-sixth share of certain immovable property in Calcutta and for partition of the property. He claims as purchaser from one Nagendra Nath the son and

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| (1) (1897) 2 C. W. N. 197. | (7) (1864) W. R. 60. |
| (2) (1897) I. L. R. 25 Calc. 254. | (8) (1846) S. D. A. 297. |
| (3) (1906) I. L. R. 29 All. 4. | (9) (1889) I. L. R. 13 Mad. 133. |
| (4) (1907) 6 C. L. J. 372. | (10) (1897) I. L. R. 21 Mad. 40. |
| (5) (1864) 1 W. R. 107. | (11) (1894) I. L. R. 21 Calc. 697. |
| (6) (1865) 2 W. R. 326. | (12) (1906) 10 C. W. N. 1085. |

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one of the six children of Sowdamini Dassi. The defendants are the other children of Sowdamini, one, a married woman being adult and the remaining four being infants. The guardian-ad-litem of the infants leaves the matter in the hands of the Court. The adult defendant pleads that the plaintiff does not disclose any cause of action, that Sowdamini was a public woman of the town, that Nagendra was born while she was living as a prostitute and was not entitled to inherit anything from her. She also pleads that Sowdamini held the property in question as her benamidar, but this point has been given up.

The facts in the case are very simple, and there is really no dispute as to them, though I cannot say that admissions have been made as to any of them. There can be no doubt that Sowdamini was a prostitute and the daughter of a prostitute; that she acquired the property in question by purchase and that she died in possession of it. There is nothing to show that either she or her mother was ever married, or how she acquired the money by which the property was bought. There is evidence that some of her daughters are prostitutes. Under these circumstances the case made by the plaintiff is that the property is to be regarded as having been Sowdamini's *stridhan*, neither *yautuka* nor given by the father, and therefore of the third class referred to in Bannerjee's Law of Hindu Marriage at p. 398. Consequently it descended to the sons and unmarried daughters of Sowdamini according to the rule expressed on p. 399 of the same work, and Nagendra obtained the sixth share which he sold to the plaintiff. To this the defendants answer that the plaintiff has failed to discharge the onus that lies on him of proving the property to have been *stridhan*; and that if it is *stridhan* it will pass to Nagendra's sisters in the first place to the exclusion of him and his brother.

As to the first point I am of opinion that the plaintiff is correct in his contention that the property must pass in this case at least as though it were *stridhan*. The facts seem to me to point strongly to the conclusion that the property in

question represented the earnings of a prostitute, but it is not necessary that I should hold more than that it was the absolute property of a prostitute at the time of her death. If this is so the view I have expressed seems to me consistent with the rules laid down in the Dayabhaga, Chapter IV, section 1 as to what is the separate property of a woman. Paragraphs 1 to 4 describe six modes in which a woman may acquire separate property, none of which seem to apply to acquisition by a prostitute as it would be doing violence to the text to suppose that the wages of prostitution could be described as "what has been conferred on the woman through affection." But these modes of acquisition do not exclude others as is shown by the very plain language of paragraph 18 which concludes "that alone is *stridhan* which she has power to give, sell or use, independently of her husband's control." But the defendant argues that all the rules presuppose that a woman has a husband, that *stridhan* is not limited to some kinds of property, but is limited by the status of the woman, and that the status must be that of a married woman. To this I think that the answer is to be found in a passage of Sir Guru Dass Bannerjee's work already referred to at p. 389, where he points out that the succession to dancing girls is not a subject with which Hindu Law cared to concern itself, but that the modern codes of the country cannot act in the same way, which seems to me to show that though property held absolutely by a prostitute may not be *stridhan* in the exact contemplation of the Dayabhaga, the operation of which is confined to married women, modern Courts must treat it as though it was *stridhan* for purposes of succession.

This leads us to the second question, namely, supposing this to be *stridhan* how is it to descend? Is there any law that confines its descent to degraded daughters in preference to sons?

The first matter to be considered in answering these questions is the effect to be given to an alleged rule that unchastity, or I may say prostitution, degrades a woman and severs the connection between her and the undegraded members of her

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family. This was acted on by this Court in *Taramunnee Dassee v. Motee Bunneeanee* (1), where on a question of inheritance two prostitute daughters of a prostitute were preferred to two grandsons of an undegraded daughter. It was acted on again in *In the goods of Kamineymoney Bewah* (2), where the son of a sister of the husband of a prostitute was held not qualified to apply for revocation of probate of the prostitute's will. The decision was approved of in *Sarnamoyee Bewah v. Secretary of State for India* (3), where a prostitute sister applied for letters of administration to a prostitute. These cases were followed in *Bhutnath Mondol v. Secretary of State for India* (4), where letters of administration were refused to the sons of the brother of the deceased husband of a prostitute, though Woodroffe J. doubted the soundness of the rule. This doubt made itself felt again in *Sundari Dassi v. Nemye Charan Daw* (5), where letters were refused to the prostitute daughter of a sister of a prostitute. The case was covered by *Sarnamoyee Bewah v. Secretary of State for India* (3), but the Court disapproved of the decision in *In the goods of Kamineymoney Bewah* (2), as being inconsistent with the decision in *Sarnamoyee Bewah v. Secretary of State for India* (3), for reasons which are not stated in the report, and which I do not apprehend.

The rule has been followed in *Sivasangu v. Minal* (6), where among four children of a prostitute of whom two daughters were also prostitutes, one of such daughters was preferred as heir to the other in preference to the sons of one of the brothers, who were born in wedlock. This decision seems to have been based in part on *Taramunnee Dassee v. Motee Bunneeanee* (1), and it was followed in *Narasanna v. Gangu* (7). But it with others to the same effect, was considered in *Sarnamoyee Bewah v. Secretary of State for India* (3), "as based more or less on local custom and usage."

(1) (1846) S. D. A. 297.

(4) (1906) 10 C. W. N. 1085.

(2) (1894) I. L. R. 21 Calc. 697.

(5) (1907) 6 C. L. J. 372.

(3) (1897) I. L. R. 25 Calc. 254.

(6) (1889) I. L. R. 12 Mad. 277.

(7) (1889) I. L. R. 13 Mad. 133.

On the other hand in *Subbaraya Pillai v. Ramasami Pillai* (1), where an undegraded relation claimed to inherit from a woman, it was held that her adultery did not sever the bond between her natural relations and herself so far as to disentitle them to inherit from her; and the same principle was followed in *Narain Das v. Tirlok Tiwari* (2), where the question was whether a natural relation could execute a decree obtained by a deceased degraded woman against a stranger.

On these authorities I find myself unable to hold that the rule laid down in *In the goods of Kamineymoney Bewah* (3) is wrong; it has been recognised in a series of decisions in this Court, and has never been actually departed from. I do not consider the Madras cases as a strong authority on the other side; Woodroffe J.'s doubts as to its soundness were not strong enough to prevent him acting on it, and the opinion expressed in *Sundari Dassi v. Nemye Charan Daw* (4), was in fact *obiter*. The decisions in *Subbaraya Pillai v. Ramasami Pillai* (1), and *Narain Das v. Tirlok Tiwari* (2), certainly raise considerable doubt but not enough to make it right for me to depart from what seems to have been the constant course of decisions in this Court.

I therefore hold that Sowdamini's prostitution severed her as far as inheritance is concerned from her natural relations.

But taking this to be so, there remains the question of how far the rule applies, and who are relations from whom the degraded woman is severed. On a question of principle if we admit that degradation causes separation one might suppose that the effect of degradation would separate the woman from all her relations at the moment she became degraded, and of course, from all persons claiming through them, and that this was the limit of its effect. The rule enforcing separation is an exception to the general rule and it must not therefore be extended beyond limits for which there is autho-

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(1) (1889) I. L. R. 23 Mad. 171.

(3) (1894) I. L. R. 21 Calc. 697.

(2) (1906) I. L. R. 29 All. 4.

(4) (1907) 6 C. L. J. 372.

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rity. *Sarnamoyee Bewah v. Secretary of State for India* (1) is an authority for the proposition that though a Hindu woman is degraded by prostitution she does not therefore cease to be a Hindu. Is there any authority for saying that the separation of a degraded woman extends beyond limits I have mentioned? The two cases, which I think may be considered from this point of view, are *Taramunee Dassee v. Mottee Buneecanee* (2), and *Sivasangu v. Minal* (3). Neither of these, however, can be considered a satisfactory authority in the present case. In the former case it is taken for granted that in *In the goods of Kamineymoney Bewah* (4), the mother of the grandsons of the prostitute whose claims were defeated by the prostitute daughters, was born in wedlock, that is, before her mother's degradation. This view of the case is also taken in Sir Gurudass Bannerjee's *Law of Marriage and Stridhan* at p. 390. I do not myself find that this is borne out by the reported facts; but it is from this point of view that the case has been followed. In the latter case the father of the boys to whom the prostitute daughter of a prostitute mother was preferred, was born after the degradation of the mother, and the case therefore covers the present if I am bound by it. But in view of the opinion of this Court already referred to, that it was based in part on local custom I do not consider it binding on me for present purposes.

Under these circumstances, I am of opinion that the rule as to separation by degradation is as I have suggested above, and that such separation does not operate to sever a prostitute from her sons or her chaste daughters born after her degradation, so as to disable them from inheriting from her.

The texts of Hindu Law admittedly do not provide for the case of the issue of degraded women, and the omission is filled up, as far as may be, by decisions of Anglo-Indian Courts. Giving the best consideration that I can to these, I am relieved to find that the conclusion at which I have ar-

(1) (1897) I. L. R. 25 Calc. 254.

(3) (1889) I. L. R. 22 Mad. 277

(2) (1846) S. D. A. 297.

(4) (1894) I. L. R. 21 Calc. 697

rived, is justified by what I consider to be considerations of equity and good conscience.

In this case I hold that Nagendra inherited one-sixth of his mother's property, and the conveyance to the plaintiff not being denied, he is entitled to a decree in his favour on the first three prayers of the plaint. He is also entitled to his costs on Scale No. 2.

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Judgment for plaintiff.

Attorney for the plaintiff: *A. N. Bose.*

Attorneys for the defendants: *G. C. Dey, T. B. Roy.*

J. C.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

NARENDRA NATH SINHA

v.

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Municipal Election—Bengal Municipal Act (III of 1884) ss. 6, 15, 103 and 105—Voter, qualification of—Illegal levy of Income-tax and payment of Municipal rate, effect of—"Owner" meaning of—Property acquired by father with contribution from Son.

A person whose income is below the taxable minimum, but who submits to the levy of the tax, does not thereby acquire the statutory qualification contemplated by section 15 of the Bengal Municipal Act. Similarly a person who is not legally liable to pay Municipal rate but pays it, does not become entitled to become a voter by the mere fact of such payment, unless it is proved to have been made by him as a person legally liable to satisfy the Municipal demand.

An "owner" for the purposes of the Municipal Act includes not only an owner in the actual occupation of the holding but also an owner entitled to receive rent from the occupier or otherwise. It also includes a manager, or agent, or a trustee for any such person.

Where a house was purchased in the name of the father, and the major portion of the consideration money was paid by the son out of

*Appeal from Appellate Decree, No. 2971- of 1910, against the decree of F. Roe, District Judge of 24-Pergannahs, dated Aug. 29, 1910, modifying the decree of Khagendra Nath Bose, Munsif of Alipur, dated Aug. 12, 1910.

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joint funds belonging to himself and his brothers, and further the expenditure on subsequent extensive alterations and additions were similarly defrayed by the son out of the said funds, and the son was occupying the house while the father was living abroad:

Held, that the son having a substantial interest in the property should be treated as owner in the ordinary acceptance of that term, and he being the manager or agent of the father could also be treated as owner, and he was therefore liable under s. 103 of the Municipal Act to pay the rates assessed on the holding.

Held, further, that where the son being in possession of the house paid the Municipal demands with his own money, it could not be said that such a payment was made by a person neither liable nor competent to make it under the provisions of the law; he being an occupier was as such liable to pay the rates under s. 105 of the Bengal Municipal Act.

SECOND Appeal by defendant No. 1, Narendra Nath Sinha.

This appeal arose out of an action brought by the plaintiff for declaration that the election of defendant No. 1, as a Municipal Commissioner was invalid. It appeared that the defendant No. 2, as Chairman of the Manicktolla Municipality, published a register of voters and it contained the name of defendant No. 1 as a qualified voter. The plaintiff's allegation was that the defendant No. 1 did not pay the Municipal rates in respect of the premises No. 59 of Charakdanga Road on his own account, his father being the owner thereof; that the income-tax deducted from the interest on Government securities held by the defendant did not qualify him to vote under clause (2), of section 15 of the Bengal Municipal Act; that he took objection to the inclusion of his name, and it was disallowed by the Chairman and also by the District Magistrate of 24-Pergannahs on the 15th July, 1910; that the election of the Commissioners of the Manicktolla Municipality would take place shortly; therefore the plaintiff brought the present suit on the 8th of July 1910, for a declaration that the defendant No. 1 was not qualified to vote. The election took place on the 23rd July, 1910, and the plaintiff thereupon asked for a perpetual injunction to restrain the defendant No. 1 from exercising his privileges as an elected Commissioner.

Defendant No. 1 contended, *inter alia*, that the Court had no jurisdiction to entertain the suit, that he was a duly qualified voter, that his father about 7 years ago retired from the

world to pass the remaining days of his life at Benares leaving him in charge of the premises No. 59, Charakdanga Road, that he and his brothers had made various additions and alterations thereto, and that therefore he was an owner within the meaning of section 6, clause (ii), of the Bengal Municipal Act; that on the 7th of June, 1910, he paid income-tax at the time of drawing interest from the Government Promissory Notes owned by him, and that therefore he was a qualified voter under section 15, clause (2) of the said Act.

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The Court of first instance having held that the contentions raised by the defendant were valid, dismissed the plaintiff's suit. On appeal the decision of the first Court was reversed by the learned District Judge of 24-Pergannahs.

Against that decision the defendant No. 1 preferred this appeal to the High Court.

Mr. B. C. Mitter, Babu Biraj Mohan Majumdar and Babu Tarakeswar Pal Chowdhry, for the appellant.

Mr. S. P. Sinha, Babu Ram Chandra Majumdar and Babu Karunamoy Bose, for the respondents.

Cur. adv. vult.

MOOKERJEE J. This appeal arises out of an action commenced by the plaintiff-respondent, for declaration of the invalidity of the election of the defendant as a Commissioner of the Manicktolla Municipality. The suit was instituted on the 8th July, 1910, after the name of the defendant had been entered in the lists as qualified to vote and also to be elected as a Commissioner. The election took place on the 23rd July, 1910, and the plaintiff thereupon asked for a perpetual injunction to restrain the defendant from exercising his privileges as an elected Commissioner. The Court of first instance held that the defendant was qualified to vote under clause 1 of the proviso to section 15 of the Bengal Municipal Act, 1884, because he had paid, during the year immediately preceding the election, Municipal rates of the aggregate amount of not less than three rupees; the Court also found that he was qua-

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lified under clause 2 of the same proviso as he had paid income-tax during that year. In this view, the suit was dismissed with costs. Upon appeal, the learned District Judge has reversed that decision. He has held, *first*, that the defendant is not qualified under clause 2 of the proviso, because his income was not such as would make him liable under the law for the payment of the income-tax, and, *secondly*, that he is not qualified under clause 1 of the proviso, because he was not owner of the house in respect of which he was assessed by the Municipality, and for which he has paid the Municipal rate. The District Judge has held in substance that although the defendant has actually paid both income-tax and Municipal rates he is not qualified, inasmuch as he was not liable under the law to pay either the tax or the rates. The defendant has now appealed to this Court, and on his behalf the decision of the District Judge has been assailed on the ground that as he has paid the income-tax as well as the Municipal rates, he is qualified to vote and to be elected, even though it is established that income-tax has been illegally levied from him, and he has been improperly made liable for the Municipal rates. It has further been contended that in so far as the Municipal rates are concerned, he was properly assessed and made liable as an occupier, if not as an owner. These contentions have been strenuously challenged on behalf of the plaintiff-respondent; and it has further been argued that in so far as the payment of income-tax is concerned, apart from the question whether the defendant was liable to pay the tax, the payment is of no assistance as it was made on the 7th June, 1910, that is not within the official year 1909-10. The answers to the questions raised, which are of some novelty and not altogether free from difficulty, must depend upon an examination of the statutory provisions on the subject.

Section 14 of the Bengal Municipal Act provides, that a certain proportion of the Commissioners of each Municipality shall be elected by male persons resident within the limits of the Municipality who shall have attained the age of 21 years. This section which defines the qualifications of electors in so

far as age, sex, and residence are concerned, is supplemented by section 15 which imposes what may be briefly called property and educational qualifications. The proviso to section 15 lays down that every male person who is at the time of election and has been for a period of not less than 12 months immediately preceding such election, resident within the limits of the Municipality, shall be entitled to vote at the election of Commissioners provided he satisfies one of three requirements. The first of these is the payment of Municipal rates, the second is the payment of income-tax, the third is an educational qualification with which I am not concerned in the present case. It is not disputed before us that the defendant resided within the limits of the Municipality for a period of not less than 12 months immediately preceding the election. The only question, therefore, which requires consideration is, whether he has fulfilled the conditions relating to the payment of the prescribed minimum amount of rates and income-tax. As already stated, there is no controversy that he has paid both rates and income-tax, but the contention of the plaintiff is that the defendant was not liable to pay either of the sums realised from him, and that, therefore, his submission to the illegal demand, and the satisfaction of the claim made upon him, do not qualify him as an elector. It will be convenient to consider the two payments separately.

In so far as the payment of income-tax is concerned, it has not been disputed that on the 7th June, 1910, income-tax was deducted from the interest on Government securities held by the defendant, but it is argued that this is of no avail, *first*, because the payment was not within the official year preceding the election; and *secondly*, because in any event, the defendant was not liable to pay any income-tax, as he has not an assessable income of one thousand rupees or upwards. In support of the first objection, it is contended on behalf of the plaintiff that the income-tax mentioned in clause (2) of the proviso to section 15 of the Bengal Municipal Act, must be paid during the official year preceding the election, because the term "year" as defined in section 6, clause (19)

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means a year beginning on the 1st day of April, consequently, as the payment in this case has been made during the official year in which the election has been held, it is of no avail to the defendant. On the other hand, it is argued that all the definitions given in section 6, must be taken qualified by the introductory words "unless there be something repugnant in the subject or context" and that the word "immediately" in the phrase "during the year immediately preceding such election" shows that the word "year" here cannot have the meaning given to the term in section 6, clause (19); the intention plainly, it is said, is that the payment should be made during the year which ends at the time of the election; from this point of view the payment of income-tax in the present case would not be open to objection on the ground that it had been made too late. The question raised is not free from difficulty, and as the second objection must prevail, it need not be decided in this case. In support of the second objection, it has been argued that the payment contemplated as a qualifying circumstance must be payment by a person liable to pay under the provisions of the law. It has been contended on the other hand, on behalf of the defendant, that as admittedly he had paid income-tax, it is immaterial that the sum has been illegally levied from him. In this connection, it may be pointed out that under section 13 of the Income-tax Act, 1886, the tax is deducted from the interest on the securities mentioned in Part III of the Second Schedule, unless the owner of the security produces a certificate from the collector that his annual income from all sources is less than the minimum taxable income. In other words, the income-tax is automatically deducted unless the holder of the security obtains an order for exemption. The question, therefore, arises, whether a person whose income is below the taxable minimum but who submits to the levy of the tax does thereby acquire statutory qualification, contemplated by section 15 of the Bengal Municipal Act. In my opinion, the question ought to be answered in the negative. The learned counsel for the defendant has argued that the effect of such an inter-

pretation would be to read into the statute restrictive words which are not to be found there. I do not feel pressed by the reasonableness of this consideration. It is well-settled that although the words used in a statute are general, they do not always receive the widest construction of which they are susceptible and their operation is often restrained by reference to other parts of the statute, to its subject-matter, or its general scope and intention, though it may be conceded that such a restrictive operation will not be attributed to general words, unless we can find in the statute itself some ground for limiting and restraining their meaning by reasonable construction and not by arbitrary addition or retrenchment: *Beckford v. Wade* (1), *Twycross v. Grant* (2), and *Garland v. Carlisle* (3). The view, we take, is supported by the canon of construction laid down in *Stradling v. Morgan* (4), which was quoted with approval by Turner L.J. in *Hawkins v. Gathercole* (5), by Halsbury L.C. in *Cox v. Hakes* (6), and by Bowen L.J. in *In re Standard Manufacturing Company* (7). "Those (statutes) which include every person in the letter, they (the sages of the law) have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act; sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances." (See also Bacon on Maxims of the Law Works, Ed. Ellis and Spedding, Vol. VII, p. 356.) Now in the present case the object of the Legislature was manifestly to confer the franchise upon persons who possessed a specified property qualification indicated by the payment of income-tax to the State. It could never have been intended that a person whose income was below the taxable minimum should secure qualification as an elector by payment of income-tax

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(1) (1805) 17 Ves. 87, 91.

(2) (1877) 2 C. P. D. 469, 530.

(3) (1837) 4 Cl. & F. 693, 726.

(4) (1560) Plowden, 199, 205.

(5) (1855) 6 DeG. M. & G. 1, 21.

(6) (1890) L. R. 15 App. Cas.
 506, 515.

(7) [1891] 1 Ch. 627, 646.

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when no such tax could under the law be levied from him. The only case in which a similar question appears to have been raised is that of *Humphry v. Kingman* (1) in which it was ruled that if a tax is regularly assessed against one who is in other respects a qualified elector, its payment, if made in good faith, will entitle him to vote although such tax was illegally assessed. The authority of the case, however, has been doubted, and the principle recognised therein could not possibly be extended to cover cases where, as here, a person with full knowledge of his disability, submits to an assessment solely with a view to acquire electoral qualification. To countenance such a device would be manifestly to encourage a fraud upon the statute, so as to defeat the true object of the Legislature. I must consequently hold in the case before me that as the income of the defendant was below the taxable minimum and as he could not be legally assessed under the Income-tax Act, his acquiescence in the deduction of the tax from the interest on the Government security held by him, cannot possibly secure for him the qualification essential for the exercise of the franchise.

In so far as the payment of municipal rates is concerned, it is not disputed that the defendant is recorded in the demand Register of the Municipality as an owner of premises No. 89, Charakdanga Road, and as such owner, he has paid the amount of rates assessed therein; but it has been argued that in the case of the first clause quite as much as in the case of the second clause of the proviso to section 15, the payment of rates, to be available as a qualifying circumstance, must be by a person legally liable to pay the same and that the defendant is not such a person as his father is the owner of the house. I am of opinion, for reasons already explained, that the payment of rates by the defendant must be proved to have been made by him as a person legally liable to satisfy the Municipal demand. Now section 103 provides that the rate upon holdings leviable under section 85, shall be payable by the owner of the holding. Section 105 then provides that the sum

(1) (1842) 5 Metcalfe (Mass.) 162.

due from the owner, if unpaid by him, may be recovered by the occupier also; consequently it would be sufficient for the defendant to establish that he is either an owner or an occupier liable to pay the rates. The term "owner" is defined in clause 11 of section 6 to include every person who is entitled for the time being to receive any rent in respect of the land with regard to which the word is used, whether from the occupier or otherwise: the term "owner" also includes a manager or agent or trustee for any such person. This clearly is not an exhaustive definition of the term "owner," because as observed in the cases of *Reg. v. Kershaw* (1), and *Dilworth v. Commissioners of Stamps* (2), the word "include" is generally used in interpretation clauses to enlarge the meaning of words so as to make them comprehend not only such things as they signify according to their natural import but also the things they are declared to include. An owner, therefore, for the purposes of the Municipal Act, includes not only an owner in actual occupation of the holding but also an owner entitled to receive rent from the occupier or otherwise. This definition, it must be remembered, however, was framed not so much with a view to confer rights as to impose liabilities, as is usual in statutes of this description (see the observations of Blackburn J., in *Cook v. Montague* (3)). Apart from this circumstance, it is plain that the definition of the term "owner" is comprehensive enough to include the father of the defendant, even though he is not in receipt of rent from his sons. The argument on behalf of the plaintiff, an argument which found favour with the learned District Judge, is that as the father of the defendants is not in receipt of rent from his sons, and lives at Benares in retirement, he cannot be deemed to be a person entitled, within the meaning of section 6, clause 11, to receive rent from the occupier or otherwise. This view, in my opinion, is manifestly fallacious. The definition is not so framed as to restrict its application only to the owner who is in actual receipt of rent, and it may be observed, that when a similar contention was raised with

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(1) (1856) 6 E. & B. 999, 1007. (2) [1899] A. C. 99, 105.

(3) (1872) L. R. 7 Q. B. 418, 422.

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reference to section 250 of Statute 18 and 19 Victoria Chapter 120, it was overruled by the Court of Appeal in *Wright v. Ingle* (1). If it be assumed, therefore, that the father of the defendant is the owner of the house, though he is not in possession, he is still owner within the extended definition of that term as given in section 6, clause 11, and consequently the defendant himself as his manager or agent has been rightly treated as the owner by the Municipality. But, upon facts patent on the record, it is plain that the defendant is also "owner" in the ordinary acceptance of the term. It is incontestable that the defendant has contributed considerable sums towards the acquisition and subsequent improvement of the property. The theory of the District Judge that these sums must be regarded as free gifts to his father is based upon no evidence at all, and cannot possibly be sustained. The presumption is that when the defendant contributed towards the cost of acquisition of the property, he became joint owner thereof with his father, *Dharma Das Kundu v. Amulya dhan Kundu* (2). From this point of view also, the defendant would be appropriately treated as owner. But, even if it be assumed for a moment that the defendant is not an owner he is, at any rate, an occupier, and as such liable to pay the rates under section 105 of the Bengal Municipal Act. It cannot be disputed that he has satisfied the Municipal demand with his money; consequently, there is no foundation for the suggestion that the payment was by a person neither liable nor competent to make it under the provisions of the law. I hold, therefore, that the defendant was qualified to be an elector under the first clause of the proviso to section 15, and hence necessarily, to be a commissioner under the same section. The conclusion follows that the objection of the plaintiff to the legality of the election cannot be sustained.

The result is that this appeal must be allowed, the decree of the District Judge reversed and that of the Court of first instance restored with costs to the defendant in all the Courts.

(1) (1885) 16 Q. B. D. 379.

(2) (1906) I. L. R. 33 Calc. 1119;
10 C. W. N. 765.

TEUNON J. In this case I have had the advantage of reading the judgment just delivered by my learned brother and need not again set out the facts or the contentions of the parties to this appeal.

For the reasons given at length by my learned brother, I agree that the appellant is not a qualified voter under the second clause of the proviso to section 15 of the Act.

On the other hand, it has been found by the Court of first instance that though the premises in question were purchased in the name of the father, the major portion of the consideration money was paid by the appellant out of the joint funds belonging to himself and his five brothers, and, further, that the expenditure on subsequent extensive alterations and additions was similarly defrayed by the appellants out of the same funds. This finding has not been displaced by the learned District Judge and there is ample evidence in support of it. Indeed, that evidence shows that out of the sum of Rs. 3,200 which formed the consideration money, Rs. 2,865 were paid by the six brothers, and that their subsequent expenditure on the property amounted to some Rs. 7,000.

The recitals in the deed of sale and the assertions made by the father to the knowledge of his son, the appellant, in certain suits and certain letters, have apparently been erroneously treated by the District Judge as conclusive evidence of the father's exclusive title. These recitals and assertions, when assented to or not contradicted by the son, may be said at best to represent admissions capable of explanation. They have been explained and there is no warrant in law for the learned District Judge's assumption that the sums spent by the sons, aggregating some Rs. 9,000, should be regarded as free gifts made by them to their father.

There is thus, in my opinion, no question that the appellant and his brothers have a substantial interest in the property and have been rightly treated by the Municipality as owner in the ordinary acceptation of that term, and, therefore, liable under section 103 of that Act to pay the rates assessed on the holding.

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In this view of the case, the payment of rates made by the appellant entitles him to a vote under the first clause of the proviso to section 15 of the Act.

For these reasons, I agree in decreeing this appeal with costs.

S. C. G.

Appeal allowed.

CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Coxe.

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Land Registration—How far ss. 78 and 81 of the Land Registration Act (Beng. VII of 1876) affect s. 60 of the Bengal Tenancy Act—Estoppel—Estoppel against Act of Legislature—Land Registration Act (Beng. VII of 1876), ss. 78, 81—Bengal Tenancy Act (VIII of 1885), s. 60.

There can be no estoppel against an Act of the Legislature.

Jagabandhu Saha v. Radha Krishna Pal (1), followed.

Section 60 of the Bengal Tenancy Act governs a suit for rent where the plaintiff claims rent as proprietor of an estate, though rent is sought to be realised on the basis of a contractual obligation.

The restrictions imposed by section 81 upon section 78 of the Land Registration Act cannot be incorporated by implication into section 60 of the Bengal Tenancy Act.

The plaintiff, an unregistered part-proprietor of an estate, is not entitled to succeed as against the defendant, who, relying upon section 60 of the Bengal Tenancy Act, has established that his debt has been discharged by payment of rent to the registered proprietor.

CIVIL RULE obtained on behalf of the plaintiff.

The plaintiff claimed to be a part-proprietor of certain *taluks*, but his name was not registered for any share of

* Civil Rule, No. 3225 of 1910, against the order of B. B. Newbold, District Judge of Dacca, dated Feb. 2, 1910, confirming the order of Mati Lal Ray, Munsif of Manikgunge, dated July 12, 1909.

(1) (1909) I. L. R. 36 Calc. 920.

these *taluks* under the Land Registration Act, 1876. The defendant executed *kabuliyats* in the plaintiff's favour in 1299 and 1300 B.S. In 1307 B.S. the defendant attorned to one Mohinikanta, whose name had been registered for an eight-anna-odd share of these *taluks* and who had got exclusive title to the village in dispute by an amicable arrangement with the other registered co-sharers. The rent claimed in this suit for the years 1312 to 1314 B.S. had been paid by the defendant to Mohinikanta. Both the Courts below dismissed the plaintiff's suit on the ground that the payment by the defendant to the co-sharer, whose name was registered, in respect of a share operated as a full discharge of defendant's liability, and that, though he had executed *kabuliyats* in favour of the plaintiff, he was not bound to pay rents to him in spite of the provisions of sections 78 and 81 of the Land Registration Act. The plaintiff, thereupon, preferred a second appeal before the High Court. The appeal was dismissed on the ground that no such appeal lay. The plaintiff then moved the High Court and obtained this Rule.

Maulvi Syed Shamshul Huda (with him *Babu Kumar Shankar Ray*), in support of the Rule. Defendant is estopped from withholding payment of rent to the plaintiff, as it was he who let him into the land. Under section 116 of the Evidence Act the defendant cannot question the title of the plaintiff, and is therefore bound to pay him rent. Section 81 of the Land Registration Act qualifies section 78 of the Act, and, as it is a case of contract, there is no bar to his recovering rent. Section 81 also qualifies section 60 of the Bengal Tenancy Act, and the defendant is not exonerated, nor is he entitled to prove payment of rent to the registered proprietor—especially the whole rent to a fractional proprietor. Section 60 of the Bengal Tenancy Act has no application because—(i) rent is claimed in pursuance of a contract, (ii) section 60 of the Bengal Tenancy Act is subject to the limitation imposed upon section 78 by section 81 of the Land Registration Act, and (iii) the proprietor to whom rent has been paid is registered in respect of a fractional share.

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Babu Harakumar Mitra (with him *Babu Heeralal Bose*), showed cause. There is no denial of the plaintiff's title, but there is a statutory bar to recovery of rent, and therefore there can be no estoppel. The contract is not for the term for which rent is claimed. It has created a tenancy from year to year with the legal incidents. The suit is for rent by the proprietor as landlord against his tenant, and not for compensation for breach of contract by the contractee. The debt is discharged by payment to the registered proprietor, and the remedy of the plaintiff, if any, lies against the registered proprietor, as provided for by the section. The restrictions imposed by section 81 upon section 78 of the Land Registration Act cannot be extended to section 60 of the Bengal Tenancy Act. The proprietor to whom rent has been paid by the defendant is registered in respect of his share, but is at the same time in possession of the entire *taluks* by some sort of arrangement, as we find, from the other registered proprietors, and the payment to him is a valid discharge of the debt.

MOOKERJEE AND COXE JJ. We are invited in this Rule to set aside a decree by which the Court of appeal below in concurrence with the Court of first instance has dismissed a suit for rent. The plaintiff alleged that the disputed holdings are situated within Taluks Nos. 4424 and 4425, of which he is a part-proprietor; that on the 25th July 1892 and the 5th December 1893 the defendant executed two *kabuliyats* in his favour and was inducted into the land; that he consented to a decree for arrears for the year 1302, but that subsequently he has attorned to one Mohinikanta and withheld rent for the years 1312 to 1314. The defendant resisted the claim broadly on the ground that the plaintiff had no title to the property, that he was not entitled to realise any rent, as his name had not been registered under section 78 of the Land Registration Act, and that, in any event, as the defendant had paid rent to Mohinikanta, who had been duly registered, there was a complete defence to the claim of the plaintiff. The Courts below have held that section 81 of the Land Regis-

tration Act, though it qualifies section 78 of the same Act, has no application to a case under section 60 of the Bengal Tenancy Act, and that consequently it is open to the defendant to prove payment of rent to the registered proprietor and to plead that the plaintiff has consequently no enforceable right as against him.

The plaintiff has assailed this decision on two grounds, namely, *first*, that as the defendant was inducted into the land by the plaintiff, on the principle of estoppel, embodied in section 116 of the Indian Evidence Act, the defendant cannot question the title of the plaintiff, and is therefore bound to pay him rent; and, *secondly*, that section 60 of the Bengal Tenancy Act is qualified by the provisions of section 81 of the Land Registration Act, and that therefore the defendant is not entitled to prove payment of rent to the registered proprietor.

In so far as the first of these contentions is concerned, it is obvious that there is no substance in it, because it is well-settled that there can be no estoppel against an Act of the Legislature. In support of this proposition, reference may be made to the decision of the Madras High Court in *The Madras Hindu Mutual Benefit Permanent Fund v. Ragava Chetti* (1), where Mr. Justice Subramania Ayyar relied upon *Barrow's Case* (2), and *Fairtitle v. Gilbert* (3). To the same effect is the decision of this Court in *Jagabandhu Saha v. Radha Krishna Pal* (4). [See also the observations of Maclean C.J. in *Jogini Mohan Chatterjee v. Bhoot Nath Ghosal* (5) and of Baron Parke in *Hill v. The Manchester and Salford Water Works Company* (6); see, further, *Doe v. Ford* (7), *Doe v. Howells* (8), *Gas Light Co. v. Turner* (9), *Doe v. Hares* (10), and *Glasgow v. Independent Co.* (11)]. We are therefore not

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(1) (1895) 1. L. R. 19 Mad. 200. (6) (1831) 2 B. & Ad. 514, 553.

(2) (1880) 14 Ch. D. 432.

(7) (1835) 3 Ad. & El. 649.

(3) (1787) 2 T. R. 169.

(8) (1831) 2 B. & Ad. 744.

(4) (1909) 1. L. R. 36 Calc. 920.

(9) (1840) 6 Bing. N. C. 324.

(5) (1903) 1. L. R. 31 Calc. 146, 149.

(10) (1833) 1 B. & Ad. 435.

(11) (1901) 2 I. R. 279, 311.

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prepared to accede to the argument of the learned Vakil for the petitioner that the principle of estoppel overrides the provisions of either section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act. The first contention of the petitioner therefore fails.

In so far as the second contention of the petitioner is concerned, it has been argued that section 60 of the Bengal Tenancy Act is not applicable, *first*, because rent is claimed by the plaintiff, not as proprietor of an estate, but under the terms of an agreement between himself and the defendant; *secondly*, because section 60 ought to be construed as subject to the same limitation as is imposed upon section 78 of the Land Registration Act by section 81 of that Act, and, *thirdly*, because the payment alleged to have been made by the defendant was made as a matter of fact to a person registered as proprietor in respect not of the entire superior interest, but of only a fractional share.

In so far as the first branch of this contention is concerned, there is no force in it. No doubt the plaintiff seeks to realise rent on the basis of a contractual obligation, but it is equally obvious that he claims rent as proprietor of two *taluks*.

In so far as the second branch of the contention is concerned, we are not prepared to accede to the argument that section 60 is to be read subject to the limitation imposed by section 81 of the Land Registration Act upon section 78. Section 78 of the Land Registration Act provides that no person shall be bound to pay rent to any person claiming such rent as proprietor of an estate in respect of which he is required by the Act to cause his name to be registered, unless the name of such claimant shall have been registered under the Act. Section 81 then provides that nothing in the three preceding sections shall be held to interfere with the conditions of any written contract. It may be conceded, therefore, that the effect of the disability imposed upon the proprietor, who has failed to register his name under section 78 of the Land Registration Act, ceases when that proprie-

tor sues to recover rent under a registered instrument. Section 60 of the Bengal Tenancy Act, on the other hand, provides that, where rent is due to the proprietor of an estate, the receipt of the person registered under the Land Registration Act as proprietor shall be a sufficient discharge for the rent. The question therefore narrows down to this—whether the protection which was intended to be afforded to the tenant under section 60 of the Bengal Tenancy Act extends to a case where the plaintiff claims to recover rent under an instrument in writing. In our opinion it is reasonably plain that the restriction imposed by section 81 upon section 78 of the Land Registration Act cannot be incorporated by implication into section 60 of the Bengal Tenancy Act.

In so far as the third branch of the contention of the learned Vakil for the petitioner is concerned, we are of opinion that it cannot be maintained in view of the decision of this Court in the cases of *Parashmoni Dassi v. Nabokrishore Lahiri* (1); and *Deoki Singh v. Lakshman Roy* (2). It was held in these cases that the Land Registration Act provides for the registration by proprietors of their shares in an estate, but does not make it incumbent upon them to register their shares in specific mouzahs or portions of land within the estate. In other words, if a proprietor is registered in respect of a certain share in an estate, and then, by an amicable arrangement amongst the co-owners, becomes entitled to collect the whole rent in respect of a particular village included within the estate, the provisions of section 78 of the Land Registration Act do not operate as a bar to the recovery of such rent. It may be observed that in the case before us there is no contest between two persons, both of whom are registered as proprietors under the Act. The plaintiff admittedly is not registered under the Land Registration Act. The person set up by the defendant as registered proprietor has his name registered in respect of certain shares. But it is alleged and proved that by amicable arrangement amongst the co-owners, that is, by amicable arrangement amongst the

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(1) (1903) I. L. R. 30 Calc. 773. (2) (1903) I. L. R. 30 Calc. 880.

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registered proprietors, this person is entitled to the whole rent of the *taluk* within which the disputed land is situated. What the precise position might have been if there had been a contest between two persons, both of whom were registered under the Act, need not be considered on the present occasion. It is sufficient to say that the plaintiff is not entitled to succeed as against the defendant, who, relying upon section 60 of the Bengal Tenancy Act, has established that his debt has been discharged by payment of rent to the registered proprietor.

The result therefore is that the decree made by the Court below must be affirmed, and this Rule discharged, with costs. We assess the hearing fee at one gold mohur.

S. M.

Rule discharged.

APPELLATE CIVIL

Before Mr. Justice Chitty and Mr. Justice N. R. Chatterjee.

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 Feb. 23.

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v.

FATEH MAHOMED HAJI.*

Mahomedan Law—Gift—Mushaa.

Where the defendant made a gift of a four-anna share in a kaimi rayati holding to the plaintiff his nephew by marriage and admitted him to joint possession with himself, and recognised the plaintiff as being in such possession for 14 years:—

Held, that he could not be allowed to say that there had been no valid gift. The doctrine of *mushaa* is not applicable to such a case.

Ibrahim Goolam Ariff v. Saiboo (1), *Emnabai v. Hajirabai* (2), *Jivan Baksh v. Imtiaz Begam* (3), *Muhammad Muntaz Ahmad v. Zubaida Jan* (4) referred to.

* Appeal from Appellate Decree, No. 490 of 1909, against the decree of Jogendra Nath Bose, Subordinate Judge of Noakhali, dated Jan. 5, 1909, modifying the decree of Rash Behari Mookerjee, Munsif of Noakhali, dated May 16, 1908.

(1) (1907) I. L. R. 35 Calc. 1.

(3) (1878) I. L. R. 2 All. 93.

(2) (1888) I. L. R. 13 Bom. 352.

(4) (1889) I. L. R. 11 All. 460.

SECOND APPEAL by the plaintiff, Abdul Aziz.

The plaintiff, who is a nephew of defendant No. 3 and was brought up by him from his childhood and in whose favour a registered deed of gift was executed in Chait 1299 corresponding with April, 1893, when he was 22 years of age, by defendant No. 3 of two-anna share in a certain *taluk* and four-anna share in a *kaimi rayati* holding, brought this suit for the recovery of the lands, the subject-matter of the gifts. The plaintiff resided with defendant No. 3 and held separate possession of the two-anna share of the *taluk*. The plaintiff, however, never had separate possession of the four-anna share in the *kaimi rayati* holding, but joint possession with defendant No. 3. Defendant No. 3 resisted the suit on the ground that the plaintiff never had separate possession of the four-anna share in the *kaimi rayati* holding, and that the gift was not binding upon him as being a gift of *mushaa*. The Court of first instance decreed the plaintiff's suit for *khas* possession. On appeal, the learned Subordinate Judge disallowed the claim of the plaintiff with respect to the four-anna share of the *kaimi rayati* holding.

The plaintiff, thereupon, appealed to the High Court.

Babu Hari Bhusan Mukerjee, for the appellant. The gift is valid and is not affected by the doctrine of *mushaa*. The gift is valid, inasmuch as the plaintiff was in possession and managed the properties during the absence of defendant No. 3 on *Haj*. The decisions of the Indian High Courts and of the Privy Council lay down that the doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined to the strictest rules. *Jiwan Baksh v. Imtiaz Begam* (1), *Mullick Abdool Guffoor v. Muleka* (2), *Emnabai v. Hajirabai* (3), *Ibrahim Goolam Ariff v. Saiboo* (4), *Muhammad Mumtaz Ahmad v. Zubaida Jan* (5) referred to.

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*Babu Baikanta Nath Das*, for the respondent. The doctrine of *mushaa* does apply to a case like the present, as the rayati holding was not partitioned and separate possession given. The cases of *Ibrahim Goolam Ariff v. Saibco* (1) and *Jiwan Baksh v. Imtiaz Begam* (2), do not apply to the facts of the present case and are distinguishable.

*Cur. adv. vult.*

CHITTY AND N. R. CHATTERJEA JJ. This is an appeal by the plaintiff in a suit to recover three plots of land from the defendants. The plaintiff based his title on a registered deed of gift executed by defendant No. 3 on 31st Chaitra 1299 (April 1893). By that deed defendant No. 3 gave to the plaintiff a two-anna share in a certain *taluk* and a four-anna share in a kaimi rayati holding. The plaintiff, who is a nephew by marriage of defendant No. 3, was adopted and brought up by him from childhood. He was about 22 years of age at the date of the gift. The plaintiff has always lived with defendant No. 3. No question now turns on the gift of the two-anna share of the *taluk*, which was demarcated by the deed of gift and of which plaintiff had had separate possession until dispossessed by defendant No. 3. As to the four-anna share in the kaimi rayati, defendant No. 3, contends that plaintiff never had separate possession of that portion and that the gift is not binding upon him as being a gift of *mushaa*. Plaintiff endeavoured to prove a partition of the kaimi rayati, but in that he failed. The Subordinate Judge has disallowed this portion of his claim; hence this appeal.

Although the plaintiff did not succeed in proving a partition, it is an undisputed fact that from the date of the deed of gift defendant No. 3 let him into joint possession of the rayati holding, and that during this defendant's absence on the Haj in 1311-12 the plaintiff was in possession of all his properties and managing them for him. It would, therefore, be most inequitable if this defendant could, after a lapse of

(1) (1907) I. L. R. 35 Cal. 1.

(2) (1878) I. L. R. 2 All. 93.



about 14 years, during which he has ratified and acknowledged the gift, turn round and by taking advantage of an extremely technical rule of Mahomedan law, deprive the plaintiff of what he gave him so many years ago.

We do not, however, think that he can do so. It is quite certain that the doctrine of *mushaa* in its inception was not intended to apply to such a case as this. It has been recognised by the Courts as an existing rule but has, by no means been universally applied. In the case of *Jiwan Baksh v. Imtiaz Begam* (1), the Allahabad High Court declined to apply the rule to a defined share in a landed estate on the ground that such a share was a separate property. The same view was taken in *Mullick Abdool Guffoor v. Muleka* (2). In *Emnabai v. Hajirabai* (3) the Bombay High Court applied the rule to the case of a gift of a moiety of a house in Bombay, but that can hardly be said to be now the law, after the decision of the Privy Council in *Ibrahim Goolam Ariff v. Saiboo* (4), where their Lordships declined to apply it in the case of free hold property in Rangoon. In the case of *Mumtaz Ahmad v. Zubaida Jan* (5), their Lordships of the Privy Council remarked "The doctrine relating to the invalidity of gifts of *mushaa* is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules." In that case it was held that possession having been given and taken the property was transferred. The same may be said in this case, defendant No. 3 having recognised the plaintiff as being in joint possession with himself for 14 years cannot now be allowed to say that there was no valid gift. We think that the appeal must be allowed, the decree of the lower Appellate Court set aside and the decree of the Court of first instance restored, and the plaintiff's entire claim decreed, with costs, in all the Courts against defendant No. 3.

*Appeal allowed.*

S. A. A. A.

- (1) (1878) I. L. R. 2 All. 93.      (3) (1888) I. L. R. 13 Bom. 352.  
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## ORIGINAL CIVIL.

*Before Mr. Justice Harington.*

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 Feb. 27.

SHIB KRISHNA DAWN &amp; CO.

v.

SATISH CHUNDER DUTT.\*

*Arbitration—Award made after expiry of time fixed by Court—Application for enlargement of time to file award—Civil Procedure Codes (Act XIV of 1882) s. 521 (c); (Act V of 1908) s. 148, Schedule II s. 15 (c).*

An award was made after the time allowed by the Court had expired. On an application for enlarging the time for making such award:

*Held*, that the Court had no power to grant the application.

*Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar* (1), followed.

*Held*, further, that where the time for making an award had expired, and no award had been made, section 148 of the Civil Procedure Code (Act V of 1908) gives the Court power to extend the time for the making of the award, notwithstanding that it had expired at the time of the application; but that section does not enable the Court to extend the time for the doing of a particular act, when in truth and in fact the act has already been done.

APPLICATION by Satish Chunder Dutt and two others, the defendants, for an order that the time to file an award be extended.

On the 10th July, 1909, Shib Krishna Dawn & Co. instituted a suit against the defendants, Satish Chunder Dutt and two others, on an award made by the arbitrators appointed by the High Court. Subsequently, all matters in dispute in that suit were, with the consent of both parties, referred, on the 21st February, 1910, to the arbitration of Babu Saroda Charan Mitter, who was required to make his award in writing and to submit the same within two months from the date on which an office copy of the said order should be delivered to him. On the 8th August, 1910, the time to make the said award was ex-

\* Application in Original Civil Suit, No. 704 of 1909.

(1) (1891) I. L. R. 13 All. 300.

tended for another two months, from the 6th August, 1910. On the 2nd September, 1910, the arbitration proceedings were completed, but the award was not signed by the arbitrator till later. In the meantime, on the 9th September, 1910, the High Court closed for the *Dasarah* vacation, and it was during this period that the returnable date of the award expired. On the 21st November, 1910, when the High Court re-opened after the *Dasarah* vacation, the award was signed by the arbitrator, and on the same date it was delivered to the Registrar. On the 8th February, 1911, the arbitrator submitted the arbitration proceedings to the High Court, and the usual notices were duly issued on the parties, informing them that the award had been submitted and that the High Court would proceed to pass judgment upon the award. On the 9th February, 1911, the defendants filed the award, and on the 21st February, 1911, they made a substantive application to the High Court to have the time to file the said award extended for such time and from such date as to the Court may seem fit, so that the same may be considered and read at the time of the defendant's application for judgment upon this award. Both these matters having been placed on the cause list of the High Court, the substantive application, which was by way of motion, came on for hearing prior to the judgment upon award.

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*Mr. N. N. Sircar*, for the defendant, applied to have the time for filing the arbitrator's award extended.

*Mr. B. C. Mitter* (*Mr. P. K. Sen* with him), for the plaintiff, opposed the application. The time may be enlarged as often as the Court chooses before the award has been made, and I submit that, when once the award has been made, whether it has been filed or not, the Court is no longer competent to enlarge the time: see *Raja Har Narain Singh v. Chaudh-rain Bhagwant Kuar* (1). Section 521 (c) of Act XIV of 1882 provides that "no award shall be valid, unless made within the period allowed by the Court." Section 15 (c), Schedule II, of Act V of 1908 contemplates the same thing, although

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the wording has been somewhat altered. I submit that the effect of both sections is that an award is void when it has been made after the expiry of the term fixed by the Court, and the Court, therefore, has no power to extend the time for making the award.

*Mr. N. N. Sircar*, in reply. Act XIV of 1882 has been amended by Act V of 1908, and the case referred to on behalf of the plaintiffs does not apply. I submit that this Court has power to extend the time. Section 148 of the amending Act contemplates the circumstances of the present case, and there is no section corresponding to it in the old Code. Section 12 of the Arbitration Act also gives the Court power to extend the time. It is contended that the award is a nullity. If this be so, no valid award has been made, and I, therefore, under Schedule II, section 8 of the new Code, ask for time for making an award.

HARINGTON J. This is a petition to extend the time within which an award may be made, and the objection taken is that the Court has no power to grant the petition because the award has already been made, and it is said that the Court cannot exercise the powers under section 148 when the award has been made. Now the case of *Raja Har Narain Singh v. Chandhrain Bhagwant Kuar* (1), decided by the Privy Council, is an authority for the proposition that the Court has not power to enlarge the time for the making of an award when the time has passed and the award has already been made. On behalf of the petitioner it is argued that section 148 alters the law laid down in that case because it enables the Court to enlarge the time for the doing of any act prescribed or allowed by the Code, notwithstanding that the period originally fixed has expired. I agree with the view that if the time had expired, and no award had been made, that that section does give the Court power to extend the time for the making of the award, notwithstanding that it had expired at the time of the application; but it appears to me that that section does not enable the Court to extend the time for the doing of a parti-

(1) (1891) I. L. R. 13 All. 300.

cular act when in truth and in fact the act has already been done. In the present case, on the 8th August, the time was extended for two months to make the award, and it is stated in the petition that the award was not signed till the 21st November, on which date according to the affidavit filed by the petitioner it was signed. It may appear hard on the parties that the Court should not have the power the petitioner considers it has, but it was quite open to the petitioner before the award was made to apply for an extension of time which the Court was able to grant under section 148. In my opinion I have no power to grant the present application and to enlarge the time within which the award is to be made because of the fact stated on the affidavit that the award has already been made, but has not been made within the time allowed by the Court. For these reasons, the application must be dismissed with costs.

C. M.

*Application dismissed.*Attorney for the plaintiffs: *Benode Behary Banerjee.*Attorneys for the defendants: *Shamul Dhone Dutt & Ghosh.*

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## PRIVY COUNCIL.

P.C.\*

1910

Nov. 10.

1911

Feb. 28.

ISHWAR SHYAM CHAND JIU

v.

RAM KANAI GHOSE.

[On appeal from the High Court at Fort William in Bengal.]

*Hindu Law—Endowment—Alienation of endowed property—Power of shebait to grant lease in perpetuity at a fixed rent—Limitation Acts (XV of 1877) Sch. II, Art. 134 and (IX of 1908), Sch. I, Art. 134—Bona fide Purchaser—Purchaser of absolute title—Privy Council, practice of—Review of former decision.*

In a suit brought by the Raja of Panchakote as the shebait of certain Hindu deities to recover possession of debutter property, which had been alienated, more than 12 years before the institution of the suit, by the plaintiff's predecessor in title, who had granted a mokurari lease of the property in consideration of a fixed rent, and payment of a fine equal to two years' rent.

*Held* (reversing the decision of the High Court), that the suit was not barred by limitation under article 134 of schedule II of Act XV of 1877, the lessees (defendants) not being the purchasers of an absolute title, and therefore not "purchasers" within the meaning of that article.

*Abhiram Goswami v. Shyama Charan Nandi* (1) followed.

The Judicial Committee of the Privy Council are averse from reviewing, on an *ex parte* application, a considered decision in a former case delivered after full argument.

APPEAL from a judgment and decree (31st July, 1905) of the High Court of Judicature at Fort William in Bengal, which reversed a judgment and decree (4th March, 1902) of the Court of the Subordinate Judge of Manbhum.

The plaintiffs were appellants to His Majesty in Council.

The suit out of which the present appeal arose was brought on 4th April, 1901, by Hari Narayan Singh Deo, Bahadur, the Raja of Panchakote as shebait of certain Thakurs (Hindu idols) established by his predecessors in the Raj, who from time to time had endowed certain properties for the services and support of the Thakurs, such properties being

\* *Present*: LORD MACNAGHTEN, LORD MERSEY, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.

(1) (1909) I. L. R. 36 Calc. 1003; L. R. 36 I. A. 148.



held and managed by the Raja of Panchakote for the time being. The subject of the suit was a mouzah called Bansra, as to which a dispute had arisen whether it was endowed property of the idols or the personal property of the Panchakote Rajas.

It appeared that mouzah Bansra had, on 23rd Assar, 1279 (26th June, 1872), been leased in putni to one Narayan Ghose, and the defendant Ram Kanai Ghose, by Nilmoni Singh, the then Raja of Panchakote and shebait of the idols, the property being stated in the kabuliat executed by the lessees in favour of Raja Nilmoni Singh to be *debutter* property. The plaintiff was the son of the grantor, who died on 24th August, 1898.

The plaintiff sued for a declaration that mouzah Bansra was debutter, dedicated to the Thakurs, and held by his father as a shebait; for a further declaration that the lease was invalid as being beyond the power of the shebait to grant and not beneficial to the endowment, and was therefore not binding on the endowment; and prayed for possession of the mouzah as shebait.

The defence was that the property in suit was only nominally debutter, and was treated as *mal* property; and that the suit was barred by limitation, inasmuch as more than 12 years had elapsed from the date of the lease.

The Subordinate Judge held on the evidence that mouzah Bansra had been absolutely dedicated to the Thakurs, and constituted a valid debutter; that the putni lease was injurious to the endowment, and, under the circumstances of the case, was not binding on the successors of the shebait who granted it; and that the suit was not barred by limitation, inasmuch as section 10 of the Limitation Act was applicable: and in that view he made a decree in favour of the plaintiff.

Against that decree an appeal was preferred, which came before a Divisional Bench of the High Court (HARRINGTON and ASUTOSH MOOKERJEE JJ.), which, on the 13th February, 1905, reversed the decision of the Subordinate Judge on the ground that the property had not been established on the evidence to be debutter. The High Court only dealt with the question of

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limitation so far as to point out that, in their opinion, the applicability of section 10 of the Limitation Act could not be supported.

Subsequently the plaintiff applied for a review of that judgment on the ground of the discovery of new and important evidence not previously within his knowledge. That evidence was a robokari found in the Collectorate and dated in 1859, which showed that, in that year, mouzah Bansra was excluded from the zamindari on the ground that it was the debutter rent-free mouzah of the Thakurs.

The application for review was granted and the appeal was reheard by the same Judges, and, on 31st July, 1905, the Court held that it was unnecessary to discuss the effect of the fresh evidence, because in any case the appeal must succeed on the question of limitation.

On this point the judgments of the High Court were as follows:

HARINGTON J. "The putni was granted on June 26th, 1872: the article of the Limitation Act applicable is article 134: the suit, therefore, became barred on 26th June, 1884.

"The learned vakil for the plaintiff has contended that the putnidar took with notice of the debutter and therefore was not a purchaser within article 134, and he relied on a judgment in *Ram Churn Tewary v. Protap Chandra Dutt Jha* (1), in which it was held that a suit to set aside a lease granted by the Ojha of the Baidyanath Temple was not barred after a lapse of 12 years. But that judgment went on the ground that the lessees were not purchasers within article 134 because they had notice the property was debutter, and that the lessor was shebait—the learned Judges held that to enable article 134 to apply the lessees must have believed themselves to be the purchasers of the absolute interest—that they knew they were only purchasers of the trust estate and that the transaction was liable to be set aside and so did not come within the article.

"When we heard the appeal we dealt with the question of notice, and, pointing out that the plaintiff's predecessor professed to grant the putni in his own right, held that the evidence did not justify the inference that the putnidar had notice the property was dedicated to an idol. The reasoning therefore of the learned Judges in the unreported case referred to is inapplicable in the present case.

"Next he contended that, the position of the shebait of an endowment being analogous to that of the guardian of the property of an infant, he could at any time sue to recover the Thakur's property.

This is a contention that the Statute of Limitation does not run against an idol, a proposition I am not prepared to accept.

"In the first place there is nothing in section 10 of the Limitation Act or in article 134 to warrant the inference that that article is not applicable. Secondly, the decisions of this Court, and those of Bombay and Allahabad Courts, are all against the plaintiff's contention.

"It was held in 1896 in the case of *Nilmoni Singh v. Jagabandhu Roy* (1) that article 134 was a bar to suits brought after a lapse of 12 years to recover property sold by the trustee of a religious endowment; this decision was followed in 1902 in the cases of *Dattagiri v. Dattatraya Krishna Sinde* (2) and *Sagun Balkrishna v. Kaji Hussein* (3). Further, there is the case of *Behari Lal v. Muhammed Multari* (4) to the same effect. With these decisions I agree, and am of opinion that the plaintiff's suit is barred."

MOOKERJEE J. "It has been argued with considerable force on behalf of the plaintiff that the evidence as it now stands is amply sufficient to justify the conclusion that the property in dispute constitutes a valid *debutter*. It has been contended, on the other hand, by the learned vakil for the defendants that, assuming that the character imputed to the property by the plaintiff is established, the suit is barred under the provisions of article 134 of schedule II of the Limitation Act. In my opinion this latter contention is well-founded and must prevail.

"Article 134 of the Limitation Act provides that a suit to recover possession of immovable property, conveyed or bequeathed in trust or mortgaged, and afterwards purchased from the trustee or mortgagee for a valuable consideration, must be instituted within 12 years from the date of the purchase. It cannot be disputed that if the property in suit of which the plaintiff seeks to recover possession is a valid *debutter*, absolutely dedicated to one or more *Thakurs*, it falls within the description of property conveyed or bequeathed in trust, and the shebait is a trustee within the meaning of this article, *Jagamba Goswami v. Ramchandra Goswami* (5). It cannot also be doubted that a lessee in the position of the defendants is a purchaser within the meaning of this article: for, as was observed by Lord Romilly in *Attorney General v. Payne* (6), a lease is an alienation *pro tanto*, and this is in accordance with the view taken by Lord Chelmsford, L. C., in *Attorney General v. Davey* (7). It has been repeatedly held that a purchaser includes the holder of a perpetual or mokurari lease and is not confined to a person who acquires an interest by an out-and-out sale; in other words, the expression purchaser for value is used in contradistinction to a mere volunteer; see *Narayan Manjaya v. Ramchandra* (8), *Nilmony Singh v. Jagabandhu Roy* (9), and *Maluji v. Fakir Chand* (10). It is also clear that the defendants are purchasers for a valuable

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| (1) (1896) I. L. R. 23 Calc. 536. | (6) (1859) 27 Beav. 168.            |
| (2) (1902) I. L. R. 27 Bom. 363.  | (7) (1859) 4 DeGex & J. 136.        |
| (3) (1903) I. L. R. 27 Bom. 500.  | (8) (1903) I. L. R. 27 Bom. 373.    |
| (4) (1898) I. L. R. 20 All. 482.  | (9) (1896) I.L.R.23 Calc. 536, 544. |
| (5) (1903) I. L. R. 31 Calc. 314. | (10) (1896) I. L. R. 22 Bom. 225.   |

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consideration, as the lease on the face of it shows that a bonus was paid at the time the putni was created. All the elements necessary to make article 134 applicable are, therefore, present, and the case is completely covered by that article; so that, as more than twelve years have elapsed since the grant of the lease, the suit is barred by limitation. The view I take is in accordance with the decision of this Court in the case of *Nilmony Singh v. Jagubandhu Roy* (1), which has been accepted as containing an accurate statement of the law on the point by the Allahabad High Court in *Behari Lal v. Muhammad Muttaki* (2), by the Bombay High Court in *Dattagiri v. Dattatraya Krishna Sinde* (3), *Narayan Manjaya v. Ramchandra* (4), and *Sagun Balkrishna v. Kaji Hussein* (5), and by the High Court of Madras in *Manavikraman v. Ammu* (6). These cases are authorities for the proposition that a suit to recover possession of *debutter* property alienated for value by a shebait in excess of his powers and in violation of the trust must be brought within 12 years of the date of the alienation; if such a suit is brought by the successor of the shebait who made the alienation, limitation as against him runs, not from the date of his appointment, but from the date of alienation. It has been argued, however, by the learned vakil for the plaintiff that all these cases were erroneously decided, that they are inconsistent with the decision of this Court in the case of *Ram Churn Tewary v. Protap Chandra Dutt Jha* (7) [Reg. Ap. 465 and 466 of 1885, decided by Tottenham and Ghose JJ. on the 2nd December, 1896], and that the correct view of the law is that each succeeding shebait is entitled to bring an action within 12 years from the date of his appointment to the office with a view to question the validity of an alienation made by any of his predecessors. In my opinion the case relied upon is clearly distinguishable and does not support the contention which is sought to be based upon it. In that case, the learned Judges found upon the evidence, that the lessee from the shebait took with full knowledge that the lessor had a qualified power of alienation and was not competent to grant a permanent lease. In the case before us there is no evidence to show that the lessee at the time he took the putni was aware that the property covered by it constituted a valid *debutter*, of which the lessor as shebait had no authority to grant a permanent lease. The learned vakil for the plaintiff has indeed invited our attention to the fact that in the lease the village is described as *debutter*; but this is obviously not conclusive, because whether the property be absolutely dedicated to a *Thakur* or be secular subject to a religious charge it would, in popular language, be fittingly described as *debutter*. Besides, the lessor is not described in the deed as a shebait of any *Thakur*, nor is there any suggestion that the rents were to be applied to the worship of any deity; even if there had been such a statement in the deed, it would not have been sufficient, as observed by their Lordships of the Judicial Committee in *Doorga Nath*

(1) (1896) I. L. R. 23 Calc. 536.

(4) (1903) I. L. R. 27 Bom. 373.

(2) (1898) I. L. R. 20 All. 482.

(5) (1903) I. L. R. 27 Bom. 500.

(3) (1902) I. L. R. 27 Bom. 363.

(6) (1901) I. L. R. 24 Mad. 471.

(7) (1886) 2 C. L. J. 448.

*Roy v. Ram Chunder Sen* (1) to prove that the mahal was *debutter*; further, the subsequent conduct of the lessees in improving the property at a considerable outlay, is wholly inconsistent with the theory that they were aware of the alleged *debutter* character of the property. I must hold accordingly that the present case is completely differentiated from the case of *Ram Churn Tewary v. Protap Chandra Dutt Jha* (2). But even if it were otherwise, and even if there had been evidence to show that at the time the lease was granted, the lessees took the property with knowledge that the lessor was acting in excess of his powers, I could not assent to the proposition that this circumstance would in any way affect the application of article 134. Article 134 refers to purchasers from a trustee for a valuable consideration, and not of purchasers in good faith and for value. To restrict the application of the article to purchasers in good faith would, in my opinion, be to put an unwarrantable limitation upon its scope, which is in no way justified by its language. I am fortified in this view by an examination of the corresponding article (No. 134) of the Limitation Act of 1871, which was restricted expressly to purchasers in good faith and for value. When the Act of 1871 was replaced by the Act of 1877, the Legislature omitted the words "in good faith," and the conclusion seems to me to be irresistible, that this alteration, as also the corresponding alteration in section 10 of the Act, was made designedly with a view to preclude the litigation likely to arise from the use of the words "good faith," and to protect a purchaser for valuable consideration from a trustee, whether such purchaser had or had not notice of the trust at the time of the transfer. To hold that this material alteration in the language of this provision of the law has left its effect unaltered, appears to me to ignore all sound canons of construction. The view I take is supported by the decision of the Bombay High Court in the cases of *Baira Khan v. Bhiku Sarba* (3) and *Yesuramji Kalnath v. Balkrishna Lakshman* (4), though I must observe that it was not open to the learned Judges, who decided the latter case, to refer to the proceedings of the Legislative Council [see *Administrator General of Bengal v. Premlal Mullick* (5)], but it is perfectly legitimate to construe, as was done by their Lordships of the Judicial Committee, in *Ishuree Pershad Narain Singh v. Lal Chutterput Singh* (6) any provision of a Statute as to the scope of which there is room for reasonable doubt by reference to the previous law on the subject. If, therefore, the learned Judges who decided the case of *Ram Churn Tewary v. Protap Chandra Dutt Jha* (2) intended to restrict the application of article 134 only to cases of purchasers for value and in good faith, I must with all respect for them dissent from this view of the law. If, on the other hand, they intended only to lay down that the purchaser who seeks the protection of article 134 must have purchased an absolute

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(1) (1876) I. L. R. 2 Calc. 341;

L. R. 4 I. A. 52.

(2) (1886) 2 C. L. J. 448.

(3) (1885) I. L. R. 9 Bom. 475.

(4) (1891) I. L. R. 15 Bom. 583.

(5) (1895) I. L. R. 22 Calc. 788;

L. R. 22 I. A. 107.

(6) (1842) 3 Moo. I. A. 100, 130.

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interest, in other words, not merely the qualified interest of the trustee or the mortgagee, the position would be sustainable. To put the matter in another way, if the transferee does not profess or intend to take an absolute interest or anything more than the qualified interest which the transferor is competent to alienate, there is no occasion for the application of article 134—see *Pandu v. Vithu* (1), where Sir Charles Sargent C.J. pointed out that, in order to give the purchaser the benefit of article 134, the purchase need not be *bonâ fide* in the sense of being without notice of the restricted nature of the transferor's title, but that the term 'purchaser' means a person who purchases that which is *de facto* a trustee's or mortgagee's limited interest upon the representation and in the belief that it is an absolute title; and this position in no way conflicts with the decision of the Judicial Committee in *Radhanath Doss v. Gisborne* (2), where Lord Cairns had in view the distinction between a *bonâ fide* purchase and a purchase of an absolute title, which appears to have been overlooked in *Bhagwan Sahai v. Bhagwan Din* (3). The view, that unless the purchaser intends to acquire an absolute interest, that is, an interest in excess of what the transferor is competent to alienate, there is no occasion for the application of article 134, may also be supported on another ground, because, as I pointed out in my judgment in the case of *Ishan Chandra v. Raja Ramranjan* (4), there can be no acquisition by adverse possession of an absolute title, when nothing but a limited interest had been asserted. I must hold accordingly that, as in the case now before us, the lessee intended to take, and did take, a permanent lease, and as more than twelve years have elapsed since the grant, the claim must be treated as barred by limitation. As regards the suggestion made by the learned vakil for the plaintiff that the cases which support this view were erroneously decided, after a careful examination of the principle upon which they are founded, I see no reason to dissent from them. I entirely agree in the line of reasoning adopted by Mr. Justice Banerji in *Nilmony Singh v. Jagabandhu Roy* (5) and by Sir Lawrence Jenkins C.J. in *Dattagiri v. Dattatraya Krishna Sinda* (6); and I may add that the view taken by these learned Judges in harmony with the rule of English Law, under 3 and 4 Will. 4 Chap. 27, section 25, deducible from the cases of *President of St. Mary Magdalen College, Oxford v. Attorney General* (7); *Commissioner of Charitable Donations and Bequests v. Wybrants* (8); *Attorney General v. Flint* (9); *Attorney General v. Davey* (10); and *Attorney General v. Payne* (11). The learned vakil for the plaintiff further contended with great earnestness that this view of the law might prove disastrous to charities, because if a dishonest trustee continues in office for twelve

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| (1) (1894) I. L. R. 19 Bom. 140.                        | (6) (1902) I. L. R. 27 Bom. 363.                  |
| (2) (1871) 14 Moo. I. A. 1, 22;<br>6 B. L. R. 530, 548. | (7) (1857) 6 H. L. C. 189.                        |
| (3) (1886) I. L. R. 9 All. 97.                          | (8) (1845) 2 Jo. & Lat. 182;<br>7 Ir. Eq. R. 580. |
| (4) (1905) 2 C. L. J. 125.                              | (9) (1844) 4 Hare 147.                            |
| (5) (1896) I. L. R. 23 Calc. 536.                       | (10) (1859) 4 DeGex & J. 136.                     |
| (11) (1859) 27 Beav. 168.                               |                                                   |



years after an improper alienation for value, the trust would be left without a remedy, assuming that a consideration of this description ought to carry any weight in the construction of a statute when the language is clear. I am not satisfied that there is any real hardship, for as soon as a breach of trust has been committed, it would be open to the beneficiaries or the persons interested in the maintenance of the *debutter*, to take suitable steps for a declaration that the alienation is invalid for the enforcement of the trust and, if need be, for the removal of the trustee. If they sleep over their rights, they can hardly be allowed to contend that each successive trustee ought to get a fresh start from the date of his appointment. If we were to accede to such a contention, we should be driven to hold that there is no period of limitation for setting aside improper alienations for value made by a trustee; in other words, that section 10 of the Limitation Act is applicable to assignees for valuable consideration quite as much as to volunteers. Such a position as this is manifestly untenable.

"The result, therefore, is that this appeal must be allowed, the decree of the Court below reversed, and the suit dismissed, with costs, throughout; the decree made by this Court at the previous hearing will accordingly be substantially maintained."

On this appeal, which was heard *ex parte*,

*DeGruyther, K.C.*, and *J. M. Parikh*, for the appellants, contended that the evidence in the record was sufficient to show that mouzah Bansra was debutter property, and not the private family property of the Raja of Panchakote; that fact was conclusively established by the additional evidence adduced at the re-hearing on review of judgment. Reference was made to Sir W. Hunter's Statistical Account of Bengal (Manbhum), vol. 17, page 323; and the documentary evidence was discussed and commented on. The document forming the fresh evidence, on which the review of judgment was obtained, was admissible under section 13 of the Evidence Act I of 1872: and the admission in evidence of a somewhat similar document in the case of *Jagamba Goswamini v. Ram Chandra Goswami* (1) was referred to. On the question of limitation it was contended that the suit was not barred by article 134 of the second schedule to the Limitation Act (XV of 1877): the defendants were not "purchasers" within the meaning of that article; by which, it was submitted, was intended a purchaser of the absolute title. A grant of the absolute title to en-

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dowed property by a shebait would be a breach of trust, and would not be valid beyond his own life, nor binding on his successors: *Shibessource Debia v. Mothooranath Acharjo* (1) and *Abhiram Goswami v. Shyama Charan Nandi* (2). In the latter case it was also held that a lease in perpetuity did not transfer the whole title in the property to the lessee, and therefore he did not come within the meaning of a "purchaser" in article 134. That case was, it was contended, similar to the present case; and reference was made to a passage in the judgment of the High Court in that case [*Shyama Charan Nandi v. Abhiram Goswami* (3)], in which Maclean C.J., after holding that the suit was barred by limitation, said: "A similar view to that expressed by us was taken by a Divisional Bench of this Court in the case of *Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh* (4). There, all the authorities, Indian and English, are collected and were reviewed in an exhaustive judgment by Mr. Justice Mookerjee. In that judgment we concur, and those authorities appear to us amply to justify our conclusion that even if mouzah Garpabari were debutter property when the lease of 1860 was granted, the suit as regards that part of it which is covered by the lease, is barred by limitation." That judgment of the High Court in *Abhiram Goswami's* case (2) had been reversed by the Judicial Committee, and it was submitted that their Lordships in reversing it, necessarily dissented from the decision in the case of *Ram Kanai Ghosh* (4), so referred to, which decision was the case now under appeal. It was submitted, therefore, that the present appeal was governed by the decision of the Judicial Committee in *Abhiram Goswami v. Shyama Charan Nandi* (2), which was not like the present an *ex parte* appeal. Reference was also made to the Limitation Act, 1877, section 10; Limitation Act (IX of 1908), schedule I, article 134, which had been altered by the insertion following the word "afterwards" of the words "transferred by" instead of "purchased from" as in article 134 of the former Act; *Kally Dass Ahiri*

(1) (1869) 13 Moo. I. A. 270.

(2) (1909) I. L. R. 36 Cal. 1003;

L. R. 36 I. A. 148.

(3) (1906) I. L. R. 33 Cal. 511.

528.

(4) (1905) 2 C. L. J. 546.

v. *Monmohini Dassee* (1); and Safford and Wheeler's Privy Council Practice (1901), page 900, showing the practice of the Judicial Committee in dealing with former judgments of the Board.

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The judgment of their Lordships was delivered by

Feb. 28. LORD MACNAGHTEN. This appeal was heard *ex parte*.

This suit was brought by the Raja of Panchakote as Shebait of some Thakurs or family idols to recover possession of a mouza alleged to be debutter and dedicated to the service of the idols. It has been alienated more than twelve years before the institution of the suit by the plaintiff's predecessor in title, who granted a mokurari lease of the property in consideration of a fixed rent and the payment of a fine equal to the amount of two years' rent.

The defence was twofold: (i) that the property was not really debutter; and (ii) that the suit was barred by article 134 of the Limitation Act.

The Subordinate Judge of Manbhum decided both points in favour of the plaintiff.

The case was heard twice on appeal by the High Court. On the first hearing the learned Judges came to the conclusion that there was not sufficient evidence to prove that the property was really debutter. They dismissed the suit on that ground, saying that it was not necessary to discuss the question of limitation. The appeal was heard again on review upon the discovery of new and important evidence. On that occasion the learned Judges held that article 134 was a bar to the suit, and that it was not necessary therefore to consider the further evidence offered as to the character of the property.

On considering the additional evidence brought before the High Court on review, their Lordships are satisfied that the property was really debutter.

The only question remaining depends on the law of limitation.

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On this point attention has been called to the case of *Abhiram Goswami v. Shyama Charan Nandi* (1) decided by this Board in July, 1909. It is impossible to distinguish that case from the present.

Whatever might have been the inclination of their opinion if the matter had been *res integra*, it seems to their Lordships that they would not be justified in reviewing on an *ex parte* application the considered judgment of the Board delivered after full argument. They will, therefore, simply follow the decision in *Abhiram Goswami v. Shyama Charan Nandi* (1). They do so with the less hesitation because the language of the article under discussion in that case and in this has been altered by subsequent legislation.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed. There will be no order as to costs either of the hearing of the suit in the Courts below, or of this appeal, except that the respondents must repay to the appellants the costs paid under the decree of the High Court.

*Appeal allowed.*

Solicitor for the appellants: *Edward Dalgado*.

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(1) (1909) I. L. R. 36 Calc. 1003; L. R. 36 I. A. 148.

## PRIVY COUNCIL

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**[On appeal from the High Court at Fort William in Bengal.]**

*Sale for Arrears of Revenue—Revenue Sale Law (Act XI of 1859)—Liability of auction-purchaser in respect of payment of arrears of revenue—Appropriation of payment to particular kist, and acceptance and acknowledgment of Treasury Officer—Subsequent appropriation by Treasury Officer to earlier kist—Sale for arrears so created; suit to set aside—Contract Act (IX of 1872) ss. 59, 60.*

Where the proprietor of an estate made a payment in respect of arrears of revenue, and in the document which accompanied the payment to the Government, expressly appropriated it to the satisfaction of a particular kist, and the money was accepted and acknowledged by the Treasury Officer as paid on that account:—

*Held*, it was not in the power of one of the parties to the transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both originally concurred.

After a payment had been so specially appropriated and accepted as paid in respect of a kist due in January 1902, the Treasury Officer applied part of it to the satisfaction of an earlier kist due in September 1901, and only paid the remainder towards the January kist, with the result that an arrear was created in the January kist to which the payment had been wholly appropriated, and a sale took place for such arrear. In a suit to set aside the sale:—

*Held* (reversing the decision of the High Court), that no arrears in respect of the January kist were really due at the date of the sale which was therefore without jurisdiction and invalid.

*Semle*: Sections 59 and 60 of the Contract Act (IX of 1872) relating to the appropriation of payments might have been applicable to the case, if the parties to the transaction had not by their own actions placed the matter beyond doubt.

APPEAL from a judgment and decree (6th July 1906) of the High Court at Calcutta, which reversed a judgment and decree (16th August 1904) of the Court of the First Subordinate Judge of Chapra.

The plaintiff was the appellant to His Majesty in Council.

\* *Present*: LORD MACNAGHTEN, LORD MERSEY, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.

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The suit out of which this appeal arose was for the annulment of a sale held on 26th March 1902 for default of payment of the Government revenue under the provisions of the Revenue Sale Law (Act XI of 1859); and the principal question for determination on the appeal related to the validity of the sale.

The facts are stated in the report of the case before the High Court (PRATT and GURTA JJ.) which will be found in I. L. R. 33 Calc. 1193.

On this appeal,

*DeGruyther, K.C.*, and *J. M. Parikh*, for the appellants, contended that the sale having taken place without jurisdiction was void and of no effect. The main ground for the sale having been without jurisdiction was that there were no arrears due. The Collector's power to sell depended upon the existence of an arrear: *Balkishen Das v. Simpson* (1); Act XI of 1859, sections 3 (definition of "arrears"), 7, 10, 14, 25 (as repealed and amended by section 2 of Bengal Act); and Rule 1 of the Rules made by the Revenue Board as to payment of arrears, were referred to. The payment of Rs. 73 was deposited expressly on account of the January kist; and though the Collector was not bound to accept it and therefore might have refused it, it was accepted and acknowledged as being in respect of the January kist. It was submitted that the appellant had the power to appropriate the payment to any particular kist, and that sections 59 and 60 of the Contract Act (IX of 1872) were applicable to the case and gave him such power. After receiving the payment as so specially appropriated, the Collector had no power to appropriate part of it to the September kist and then declare that there was an arrear in the January kist and sell the property for that arrear. The sale, it was contended, having taken place under such circumstances was invalid. Reference was made to the Revenue Sale Manual, page 98; Act XI of 1859, sections 5, 6, 17 and 18; The Revenue Board's Tauji Manual (1907) pages 31, 32, Rule 18; *Jogendra Mohan Sen v.*

(1) (1898) I. L. R. 25 Calc. 833, 842; L. R. 25 I. A. 151, 158.



*Uma Nath Guha* (1); and *Nandan Missir v. Lala Harakh Narain* (2). The judgment of the High Court was also wrong in holding that the appellant was bound to pay the revenue although he had not received the certificate of sale; and *Dheput Singh v. Mothooranath Jah* (3), which decided that the title of an auction-purchaser accrued not from the date of sale, but from the date on which the certificate of sale was granted, was referred to.

*B. Dube*, for the respondents, contended that the grounds which the appellant now put forward were not those specified in his appeal to the Commissioner; and he was precluded from questioning the validity of the sale on other grounds than those so specified. *Gobind Lal Roy v. Ramjanam Misser* (4); and sections 3, 6, 10, 25 and 33 of Act XI of 1859 were referred to. The liability of the appellant to pay revenue commenced not from the date of the certificate of sale, but from the date when the sale took place; and he then under section 30 of Act XI of 1859 became liable for the arrears due, as he took subject to all existing incumbrances; *Shyam Kumari v. Rameshwar Singh* (5) and Act XI of 1859, sections 28, 53 and 54. Arrears were then due, and it was not necessary under the Act that the sale should take place for any particular kist. The sale could not be set aside for mere hardship. The appellant, it was submitted, had not shown that the sale was held contrary to the provisions of Act XI of 1859, or that he had sustained substantial injury by reason of any irregularity; and the High Court's decision should be upheld as being correct.

The respondents were not heard in reply.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a decision of the High Court, Calcutta, overruling that of the Subordi-

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(1) (1908) I. L. R. 35 Calc. 636.

(2) (1910) 14 C. W. N. 607.

(3) (1864) W. R. Gap. No. 278.

(4) (1893) I. L. R. 21 Calc. 70,

82, 83; L. R. 20 I. A. 165, 174.

(5) (1904) I. L. R. 32 Calc. 27, 38;

L. R. 31 I. A. 176, 186.

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nate Judge of Chapra. The object of the suit, as brought by the plaintiff and now appellant, was to set aside a revenue sale, and to recover possession of the property sold. The defendants were the purchaser and others who derived title from him. In the First Court the decision was in favour of the plaintiff upon grounds which it is unnecessary now to examine.

From that decision there was an appeal to the High Court, and that Court overruled the decision of the First Court. Various grounds were urged on the one side and on the other, on the argument of that appeal, all of which were dealt with by the learned Judges in their judgment, but of all those grounds, there is only one which it appears to their Lordships necessary now to consider.

The facts, so far as it is necessary to examine them at the present stage, can be shortly stated. The property in question is an ijmalī kalam, forming part of the Mahal Bhawaspur. That property was put up for sale by the Collector of Chapra on the 16th September 1901, in respect of arrears of revenue, but as no bidder offered, the Collector stopped the sale, and declared that the whole estate would be put up to sale at a later date, acting under section 14 of the Revenue Sale Law (Act XI of 1859).

On the 17th September 1901, the plaintiff (as permitted by section 14 already referred to) paid the arrears due, and was declared the purchaser of the ijmalī kalam. He did not, however, receive his sale certificate until the 8th February 1902. In the meantime, between the sale and the sale certificate, kists of revenue became payable in respect of the property in September 1901 and in January 1902.

On the 13th January 1902 the purchaser, the plaintiff-appellant, paid in to the Treasury a sum of Rs. 73, appropriating that payment in the document which accompanied the payment to the Government to the January kist, and the payment was received and accepted on that account. Subsequently, however, the officers of the Treasury appropriated the sum paid, in the first place to the satisfaction of the September 1901 kist, and then, as far as the money would go, towards the January 1902 kist, the result being, according to

this method of accounting, to leave a sum of Rs. 16-12-2 still due in respect of the January kist.

Subsequently, on the 26th March 1902, the Collector put up the property for sale in respect of the amount so appearing due of the January kist.

The only point which their Lordships think it necessary to dispose of on the present appeal is, whether the amount of the January kist in respect of which the sale was made was really due at the time of the sale, and whether therefore there was any legal power to sell.

Much was said in the argument about the bearing upon the present case of certain provisions of the Contract Act, relating to the appropriation of payments. Those enactments might perhaps have had a bearing upon the case, if the parties had not by their own actions placed the matter beyond doubt.

The money in question in the present case was expressly paid to satisfy the January kist, and it was received and acknowledged on that account. It requires no statutory provision to show that when money has been so paid and received and appropriated, it is not in the power of one of the parties to the transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both originally concurred.

For these reasons their Lordships are of opinion that no arrears in respect of the January kist were due at the date of the sale, and that therefore the sale was without jurisdiction. Accordingly they will humbly advise His Majesty that the judgment and decree of the High Court should be set aside and that of the Subordinate Judge restored, with costs in both Courts.

The respondents will pay the costs of this appeal.

*Appeal allowed.*

Solicitor for the appellant: *Edward Dalgado.*

Solicitors for the respondents: *Barrow, Rogers, & Nevill.*

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## INSOLVENCY JURISDICTION.

*Before Mr. Justice Harington.*

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*In re L. KING & CO., BANKRUPTS.\**

March 7. *Insolvency—Adjudication in England Trustee in Bankruptcy—Petition to the Indian Court to act in aid of, and to be auxiliary to, the English Court—Examination of Witness—Jurisdiction—Bankruptcy Act, 18\*3 (46 and 47 Vict. C. 52) ss. 27, 118—Presidency-Towns Insolvency Act (III of 1909) s. 126.*

The firm of L. King & Co. carrying on business in London as well as in Calcutta was adjudicated bankrupt in England, and a Trustee in Bankruptcy of the property of the firm was appointed by the English Court. On an application of the Trustee in Bankruptcy to that Court, it was ordered that the High Court of Judicature in Bengal be requested to act in aid of and be auxiliary to it. The Trustee in Bankruptcy, thereupon, petitioned the High Court in Bengal presenting the order of the English Court and seeking the assistance of the High Court in and about the said insolvency. He obtained an order that the High Court of Judicature in Bengal and its officers do act in aid and be auxiliary to the High Court of Justice in England and, further, that James, the manager in Calcutta of the firm of L. King & Co., do personally attend before this Court to be examined before it. Upon James appearing on the date fixed for his examination and objecting that he ought not to be examined, because the order ought not to have been made:—

*Held*, that to get the jurisdiction to examine James as a witness, there must be a request from the English Court asking this Court to act in aid, and a letter of request from the one Court to the other ought to have been sent, and that the order of the English Court presented by the Trustee in Bankruptcy was not sufficient to give this Court jurisdiction.

A MATTER in insolvency for the examination of one F. S. C. James, the manager in Calcutta of the firm of L. King & Co., adjudicated bankrupts, and carrying on business in London as well as in Calcutta as jute merchants.

The facts were as follows:—By an order made by the High Court of Justice in Bankruptcy in England, on the 19th December, 1910, L. King & Co. were adjudicated bankrupts and

\* Insolvency case No. 1 of 1911.

one Charles James Marsh of London, Chartered Accountant, was appointed, on the 20th December, 1910, Trustee in Bankruptcy in the High Court of Justice in England of the property of the bankrupts. On the 22nd December, 1910, Charles James Marsh, as such trustee, applied to the High Court of Justice in England acting in Bankruptcy and obtained an order pursuant to section 118 of the Bankruptcy Act, 1883, that the High Court of Judicature in Bengal having jurisdiction in insolvency and its officers be requested to act in aid, and be auxiliary to, the High Court of Justice in England in the matter of this bankruptcy in regard to, *inter alia*, the taking of examinations under section 27 of the Bankruptcy Act, 1883, of any witness residing or temporarily within the jurisdiction of such Court. Charles James Marsh, thereupon, petitioned the High Court of Judicature in Bengal presenting the order of the English Court, and, on the 9th February, 1911, it was ordered that the High Court of Judicature in Bengal and its officers do act in aid, and be auxiliary to, the High Court of Justice in Bankruptcy in England pursuant to section 118 of the Bankruptcy Act, 1883, in the matters referred to in the order made by the said High Court of Justice on the 22nd December, 1910, with regard to the bankruptcy of the said L. King & Co., and further that F. S. C. James, the manager in Calcutta of L. King & Co., being served with this order do personally attend before this Court to be examined before it.

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On the date fixed for his examination, James appeared and objected to his being examined as a witness, because the order ought not to have been made.

*Mr. Aretoom*, for F. S. C. James. I appear under protest and submit that as there has been no request made by the Court of Bankruptcy in England to this Court, as provided for under section 118 of the Bankruptcy Act of 1883, this Court should not proceed any further. I rely on section 118 of that Act. In this case the Trustee in Bankruptcy has applied and obtained an order on the 9th February, 1911, that this Court should act in aid, and be auxiliary to, the Court in

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England; but I submit that this Court ought not to have made such an order, having regard to the fact that no request was made to it by the English Court. Unless that order is brought to the notice of this Court by the Bankruptcy Court of England, the Trustee in Bankruptcy has no jurisdiction: see *In the matter of Shrager Bros.* (1), decided by Fletcher J. in 1910.

*In the matter of William Watson* (2), Henderson J. refused to make an order under similar circumstances in terms of the order made on the 9th February, 1911. The Trustee in Bankruptcy is nobody here. Not being an officer of the Court, but merely a person appointed by the creditors, he has no *locus standi* in this Court. The Court in England must ask the Court here specially to act in aid and be auxiliary to it.

*Mr. Buckland*, for the Trustee in Bankruptcy (*contra*). The case of *William Watson* (2) differs from the present case. In that case the Trustee in Bankruptcy before moving this Court, had not taken the necessary steps to do so. While in the present case the order was made, signed, sealed and filed in this Court. Therefore, I submit that unless this order is set aside—and there is no application as yet to that effect—this Court will act upon it. All that is necessary is, that there be a request in substance from the English Court to this Court and then this Court will make the order practically of its own motion. It is perfectly immaterial if the request is moved from outside as, for example, by the Trustee in Bankruptcy who has power to move this Court. This Court cannot become seised in this matter until it has first acted under section 126 of the Indian Act, and it is only when it is so seised that section 118 of the English Act will be brought into operation, and the Court will deal with the matter before it. Until then it will not look at anything done by the English Court. The existing order under section 118 of the Bankruptcy Act once brought to the notice of this Court is sufficient to supply the necessary request and this Court will give effect to it under section 126 of the Indian Act. The mode in which the notice has to be brought is not laid down in

(1) (1910) Unreported.

(2) (1904) I. L. R. 31 Cal. 761.



either of the Acts. I submit, therefore, the proceedings are all in order and this Court is bound to Act in aid of, and to be auxiliary to, the Court in England. Furthermore, I submit, that James is a witness and not a party to aid discovery sought by the Trustee in Bankruptcy, and a witness has no *locus standi* to object to this Court acting in aid of, and being auxiliary to, the Bankruptcy Court in England. If there is any substance in the objection it should be made in England by the insolvent himself. James may possibly object to stand for his examination, but he does not say so. I, therefore, submit that the objection to the jurisdiction of this Court cannot be seriously contended.

*Mr. Avetoom*, in reply. There has been no case in this Court where the Court has acted without a request from the Bankruptcy Court in England. *In the matter of Shrager Bros.* (1), this Court refused to act in conjunction with the Trustee in Bankruptcy until it was requested by the Bankruptcy Court in England.

HARINGTON J. This is a matter in which an order has been made directing a Mr. James to attend here to be examined. The order was made in pursuance of the statute which directs this Court to act in aid of the Bankruptcy Court at home. Mr. James objects that he ought not to be examined because the order ought not to have been made. Inasmuch as the order was made *ex parte*, it is open to him to take the objection that the order ought not to be made, and that this Court had no jurisdiction in the matter before it to direct him to be examined against his will. The question to be considered and which has been argued at some length is whether on the materials before me this Court has jurisdiction to examine Mr. James under the provision of the law directing the English Court to authorise another Court to act in aid. Now the section dealing with this matter is section 126 of the Indian Insolvency Act, which provides that all Courts having jurisdiction under this Act shall make such orders and do such things as may be necessary to give

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effect to section 118 of the Bankruptcy Act, 1883. It is necessary to refer to the Bankruptcy Act, section 118, to see what it is this Court has to give effect to. Now that section provides "that every British Court elsewhere"—that is, outside the United Kingdom—"having jurisdiction in bankruptcy or insolvency, and the officers of those Courts respectively, shall severally act in aid of, and be auxiliary to, each other in all matters of bankruptcy, and an order of the Court seeking aid, with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either the Court which made the request, or the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdiction." The provision under which Mr. James could have been examined under the English Bankruptcy Act is contained in section 27 of that Act, and it is that jurisdiction that this Court is asked to exercise. The objection taken by the learned counsel for Mr. James is this: to get this jurisdiction there must be a request from the English Court asking this Court to act in aid and a letter of request from the one Court to the other ought to have been sent and that the order of the English Court presented by the Trustee in Bankruptcy is not sufficient to give this Court jurisdiction. On the best consideration I can give to the matter, I think that contention is right. It appears to me that under section 118 the jurisdiction, in respect of which this Court is asked to exercise its powers as a Court in aid, is given on the request of the English Court, and in the absence of a request by the English Court to this Court the jurisdiction cannot properly be exercised. To my mind the presentation, therefore, of a copy of the order of the Court by some other person is not sufficient. The order, therefore, I make is that this matter stand over for two months in order that if the English Bankruptcy Court thinks fit to give a letter of request to act in aid, the application may be renewed.

O. M.

Attorneys for the Trustee in Bankruptcy: *Leslie & Hinds.*  
Attorneys for the witness: *Orr, Dignam & Co.*

## CRIMINAL REVISION.

*Before Mr. Justice Cuspersz and Mr. Justice Sharfuddin.*

RUDOLF STALLMANN

*v.*

EMPEROR.\*

1911

May 24.

*Extradition—Jurisdiction of High Court to revise proceedings of Magistrates under the Extradition Act—High Courts Act, 1861 (24 and 25 Vict. c. 104) s. 15—Extradition Act (XV of 1903) ss 3 and 4.*

The High Court has no jurisdiction, under s. 15 of the Charter Act, to revise the proceedings of a Magistrate acting under ss. 3 and 4 of the Extradition Act.

*In re Mohunt Deva Dass* (1) referred to.

On the 23rd April, 1911, an application was made by Mr. Ellis, Superintendent of the Criminal Investigation Department, under section 4 (1) of the Extradition Act (XV of 1903), to Babu Sukumar Haldar, a first-class Magistrate at Alipore, for a warrant of arrest against the petitioner, alleging that a telegram had been received from Cape Town in South Africa, through the Aden Government, addressed to the police at Calcutta, that one Rudolf Stallmann *alias* Von Konig was wanted by the Berlin police for obtaining money under false pretences, that he had left Beira under the name of Von Kerner by the steamer "Caspian" for Calcutta, that the Consul General for Germany at Simla had received a wire from his Government requesting him to apply to the Government of India for the petitioner's arrest, that the Government of India had, through the Bengal Government, directed that steps be taken to comply with the demand of the Consul General, and that the Bengal Government had instructed the Commissioner of Police to take the necessary action in the matter. With the complaint Mr. Ellis filed a copy of a telegram from the Imperial Chancellor of Germany requesting

\* Criminal Motion, No. 577 of 1911, against the order of J. A. L. Swan, District Magistrate of Alipore, dated May 20, 1911.

(1) (1898) I. L. R. 38 Calc. 550.

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that the petitioner might be detained in custody with the property found on him in accordance with the terms of the Extradition Treaty between England and Germany, dated the 14th May, 1872. On the next day the Magistrate ordered the issue of a warrant, under section 4 (1) of the Extradition Act, which charged the petitioner with the offence of obtaining money under false pretences at Berlin. The petitioner was arrested on the 26th at Diamond Harbour, taken to Calcutta, and kept in the Lall Bazar police station with his luggage. On the 27th the luggage was searched and the police took charge of the same. He was then produced before Babu Sukumar Halder, who released him on his personal recognizance in the sum of Rs. 2,000. On the 29th the petitioner filed an application for the return of his property before the same Magistrate who fixed the 2nd May for the hearing of the matter. On the latter date the District Magistrate of Alipore withdrew the case to his own Court and dismissed the application. On the 8th a letter was addressed by the Secretary to the Government of Bengal, Judicial Department, to the District Magistrate of Alipore intimating that a requisition had been made to the Government of India for the surrender of the petitioner for forgery and dishonestly inducing the delivery of property by cheating, and directing the Magistrate, under section 3 (1), of the Extradition Act, to inquire into the case. The Magistrate thereupon issued a warrant for the arrest of the petitioner under section 3 (2) of the Act. On the next day the petitioner was produced before him, and he ordered the latter to furnish personal recognizance in the sum of Rs. 2,000 and bail of two sureties to the amount of Rs. 5,000 each. On the 12th the High Court, on motion, reduced the amount of the security. The petitioner on appearing before the Magistrate on the 20th was re-arrested on a fresh warrant under section 3 (2) of the Act, and evidence recorded in the inquiry. He then moved the High Court for a Rule to quash the proceedings on the grounds that neither Babu Sukumar Halder nor the District Magistrate had power to issue warrants under sections 3 and 4 of the Extradition Act; that the District Magis-

trate was not competent to withdraw the case to his own file, nor to initiate proceedings against him on the 8th May, nor to draw up fresh proceedings on the 20th; that the latter had improperly admitted evidence; and that there was no evidence to authorize his further detention, nor proof of the commission of any extraditable offence.

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*Mr. Jackson* (with him *Mr. Stephen, Mr. K. N. Chaudhuri* and *Mr. Chippendale*), for the petitioner. Under section 4 (1) of the Extradition Act (XV of 1903), a fugitive criminal must be within the local limits of the jurisdiction of the Magistrate who is authorized to issue a warrant. The petitioner was arrested in the Bay of Bengal, which is not within the jurisdiction of Mr. Halder. Section 3 (1) does not empower the Government to direct a Magistrate to arrest a person outside the limits of his jurisdiction and to inquire into his case. The powers of holding an inquiry under section 3 (1) and of issuing a warrant under section 4 are conferred on Magistrates within whose local jurisdiction the criminal is at the time. The petitioner was in attendance in Court, as an accused, at the time of his re-arrest. To say that in such a case he was arrested within the jurisdiction of the Court, is a farce. The District Magistrate had no authority to draw up a fresh proceeding under section 3 (1) of the Act on the 20th May. The letter from the Secretary to the Government of India, dated 10th May, 1911, to such Magistrate was not an order under section 3 (1), as it purports only to ratify and confirm the order of the 8th May. The Magistrate improperly admitted in evidence the records of the Berlin Court, as they were not duly authenticated and certified under sections 78 and 46 of the Evidence Act. There is no evidence that the petitioner committed any extraditable offence. The evidence as disclosed in the Berlin depositions do not constitute forgery and delivery of the bill by false pretences.

*Cur. adv. vult.*

CASPERSZ AND SHARFUDDIN JJ. This is an application under section 15 of the High Courts Act, 1861, in respect

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of certain proceedings under the Indian Extradition Act, 1903, pending before the District Magistrate of the 24-Pergannahs, at Alipore, against the petitioner Rudolf Stallmann *alias* Rudolf Von Konig, who was originally arrested on board the S.S. "Caspian" as the steamer was coming up the river Hooghly on her way to the Port of Calcutta on the 26th April, 1911.

The proceedings are in apparent compliance with the Extradition Act, but we are invited to issue a Rule, and to call up all the papers of the case, in order to quash the proceedings on two grounds: (i) that the District Magistrate of the 24-Pergannahs has no jurisdiction in the matter, and (ii) that there is no legal evidence before the District Magistrate to justify the detention of the petitioner.

We have carefully considered this application since hearing learned counsel yesterday, and, in our opinion, we have no jurisdiction in the matter.

Section 15 of the Charter Act gives this Court "superintendence over all Courts which may be subject to its Appellate Jurisdiction." The District Magistrate of the 24-Pergannahs acting under the Extradition Act is not subject to any appellate jurisdiction: he makes inquiry and reports the result to Government: his powers are specially conferred for the limited purposes of the Act. No appeal lies to this Court from the decision which any Magistrate may arrive at under the Act. On this ground alone, if for no other reason, we must decline to interfere.

The same view was adopted by Hill and Stevens, JJ., on the 5th January, 1898, in *In re Mohunt Deva Dass*,\* in respect

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\* *Before Mr. Justice Hill and Mr. Justice Stevens.*

*In re* MOHUNT DEVA DASS.‡

1898  
 Jan. 5.

Mr. Jackson, Mr. Palit, Mr. L. Ghose, and Babu Digambar Chatterjee, for the petitioner.

HILL AND STEVENS JJ. This application arises out of an inquiry pending before the Magistrate of Mozufferpore under the provisions of section 14 of Act XXI of 1879.

‡ Criminal Miscellaneous, No. 1 of 1898.



of an inquiry pending before the Magistrate of Mozufferpore under the provisions of section 14 of Act XXI of 1879. The learned Judges observed: "We do not think that we possess any power to control or interfere in the conduct of an enquiry under section 14 of the Act," and, in another passage, they say "the competency of a Magistrate to hold an inquiry under the section depends on the authorization of the Executive Government." Such authorization (under section 14) was by means of "an order to any Magistrate who would have had jurisdiction to inquire into the offence if it had been committed within the local limits of his jurisdiction, directing him to inquire into the truth of such accusation." The language of the present Act is the same in essentials. Here, we may observe that the words "local limits" do not refer to the territorial jurisdiction of the Magistrate selected by Government to conduct the inquiry, for "any Magistrate" may be so authorized if he be a first-class Magistrate or a Magistrate empowered by the Local Government in that behalf.

The petitioner is not without remedy. He may, under section 3 (6) of the Act, submit any written statement for the consideration of the Government, and if the report of the Magistrate, or the written statement of the petitioner, raises an

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We are asked on various grounds, to which it is unnecessary to refer more particularly, either to transfer the inquiry from the Magistrate of Mozufferpore to some other Magistrate, and, if necessary, to request the Governor General in Council to appoint another Magistrate for that purpose, or to direct the Magistrate of Mozufferpore to re-open the inquiry and to conduct it in accordance with law: and to obviate further difficulty, we are also asked to declare by what procedure the Magistrate should be guided in the further conduct of the inquiry.

As to the first of these prayers, we think that we have no power to order the transfer of the inquiry, if for no other reason, because the competency of a Magistrate to hold an inquiry under the section depends on the authorization of the Executive Government, nor are we aware of any provision of the 1 which would empower us to request the Government to appoint another Magistrate, so as to enable us to transfer the inquiry to that Magistrate if appointed. With regard to the alternative prayer of the petition we do not think that we possess any power to control or interfere in the conduct of an inquiry held under section 14 of the Act. We accordingly refuse the application.

*Application refused.*

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important question of law, that question may be referred to this Court for decision. This special procedure, it seems, takes the place of that indicated in section 491 of the Code of Criminal Procedure which gives directions of the nature of a *habeas corpus*. If the Legislature had intended that proceedings under the Extradition Act should be subject to the superintendence of this Court, it would not have provided the machinery we have just mentioned.

It may be added that the proceedings against the petitioner may be stayed under section 5 (2) of the Act by the Government, and not by this Court.

We have also examined for ourselves the procedure under the English Statute, but it would serve no useful purpose to fortify our conclusion by discussing it. The application is refused.

F. H. M.

*Application refused.*

## ORIGINAL CIVIL.

*Before Mr. Justice Mookerjee and Mr. Justice Teunon.*

KESHO PRASAD SINGH

*v.*

THE BOARD OF REVENUE.\*

1911

March 2.

*Mandamus—Specific Relief Act (I of 1877), ss. 45 and 46—Mandamus, writ of, on the Board of Revenue—Want of necessary party—Other legal remedy being available whether the Court will interfere.*

A *mandamus* will never be granted to enforce the general law of the land which may be enforced by action.

A having obtained a decree for recovery of possession of an estate against an infant under the Court of Wards, and the Collector of the District, representing that Court, applied during the pendency of an appeal by the defendants to the High Court, to the Members of the Board of Revenue forming the Court of Wards that the estate might be released in his favour. This application having been rejected A obtained a Rule from the Original Side of the High Court under s. 45 of the Specific Relief Act, calling upon the Members of the Board only to show cause why they should not forthwith release the estate. The Rule was not served upon the infant, whose interest would be affected if the Rule were made absolute:

*Held*, that inasmuch as the petitioner had failed to comply with Rule 483 of the Rules of the High Court, Original Side, by not serving the Rule upon the infant, and that inasmuch as he had an adequate legal remedy by way of execution of the decree obtained by him, the Rule was liable to be discharged, and the petitioner could not get any relief under s. 46 of the Act.

*Held*, further, that unless the Court was satisfied that the doing of or forbearing from an act was consonant to right and justice, and such doing and forbearing was under any law for the time being in force clearly incumbent on the person against whom the order was sought, no *mandamus* ought to be granted; and that title to property would not be tried in *mandamus* proceedings and the writ would not issue when it was necessary to try or decide complicated or extended questions of fact.

RULE obtained by Kesho Prasad Singh, the petitioner.

The petitioner stated that on the death of Maharani Beni Prasad Koeri, he as the next reversionary heir was entitled

\* Application under s. 45 of the Specific Relief Act, 1877. (Extraordinary Original Civil Jurisdiction.)

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to the Dumraon Raj Estate; but the Court of Wards took possession of the said Raj on behalf of the infant Jung Bahadur Singh, on the allegation that he was the legally adopted son of the deceased Maharani. He made representations to the Local Government and proper authorities for the release of the estate but did not get any relief from them. He subsequently brought a suit in the Court of the Subordinate Judge of Shahabad for recovery of possession of the Dumraon Raj Estate against the infant, who was represented by his Manager, and the Court of Wards and the Collector of the district. The learned Subordinate Judge decreed the suit; and the defendants preferred an appeal to the High Court. Pending the appeal the plaintiff made an application to the Members of the Board of Revenue for the release of the estate, but his application was rejected. Then he made an application to the Original Side of the High Court under section 45 of the Specific Relief Act, and obtained this Rule on Mr. F. A. Slacke and Mr. W. C. Macpherson, the Members of the Board of Revenue, to show cause why they should not release the estate, and make over possession to the plaintiff. The Rule was served only upon the Members of the Board of Revenue, but not upon the infant.

*Mr. Pugh and Mr. B. C. Mitter*, for the petitioner.

*Mr. S. P. Sinha*, for the opposite party.

*Cur. adv. vult.*

MOOKERJEE AND TEUNON JJ. The allegations upon which this Rule was issued on an application under section 45 of the Specific Relief Act, may be briefly set out. Maharani Beni Prasad Koeri, Maharani of Dumraon, died on the 13th December 1907. The petitioner, Kesho Prasad Singh, alleges that he thereupon became entitled to the Dumraon Raj estate, but on the 16th December 1907, the Court of Wards declared an infant, Jung Bahadur Singh, as a ward of the Court and took possession of the estate as if it belonged to the infant in question. The petitioner further alleges that he addressed various memorials to the Government of Bengal and protested against the possession by the Court of Wards of the said Raj.

As his efforts were unsuccessful, he commenced an action on the 5th February 1909, in the Court of the Subordinate Judge of Shahabad, against the infant represented by his guardian and the Collector of Shahabad as representing the Court of Wards. The trial of the suit lasted from the 1st December 1909 to the 13th July 1910, and on the 12th August 1910 judgment was pronounced in favour of the petitioner. Subsequently on the 31st August, he applied to the Members of the Board of Revenue, forming the Court of Wards, that the estate might be released in his favour. Intimation was sent to him on the same date that the Court declined to comply with his request. He then obtained this Rule, on the 8th September 1910, calling upon Mr. Slacke and Mr. Macpherson, Members of the Board of Revenue, to show cause why they should not forthwith release the Dumraon Raj estate from the charge of the Court of Wards, and take all necessary steps for the purpose. The learned counsel who has appeared to show cause has contended that the application is open to various objections, anyone of which is sufficient to justify its refusal.

It has been argued, in the first place, that the petitioner has failed to comply with Rule 483 of the Rules of this Court which provides that unless otherwise ordered, every Rule issued under section 46 of the Specific Relief Act upon an application under section 45 shall call not only on the public servant, corporation, or inferior Court, but also on any person other than the applicant who may be affected by the Act to be done or forborne, to show cause. It is not disputed that the present Rule has been served only upon the Members of the Board of Revenue; it has not been served upon the infant who would be undoubtedly affected, if the application were granted. The objection, therefore, is fatal; it is one of substance and not of mere form, for the principle has been recognised wherever writs of *mandamus* are issued, that if a right, title or interest, in or to real property, is directly involved, all persons owning or claiming the same, must as a rule be joined as parties. We do not desire, however, to rest our decision on this ground because possibly if the application were meritorious, the Court might, upon payment of all costs by the petitioner,

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still allow the petition to be amended, and notice thereof given to all necessary parties before the Rule was heard.

It has been contended, in the second place, that the application ought to be refused, because the applicant has other specific and adequate legal remedy. It is an elementary principle that recourse ought not to be allowed to an extraordinary remedy of this description, when it is not really needed. In the case before us, the plaintiff is entitled to sue in ejectment; he has brought such a suit and has been successful; he is entitled to execute his decree, but has not yet taken any steps in that direction. It is well settled that a *mandamus* will never be granted to enforce the general law of the land which may be enforced by action; for instance, where the applicant has the ordinary legal remedy of an execution, *mandamus* does not lie: *R. v. Chester* (1). Consequently, where an action has been brought and judgment entered against a company, the Court would refuse to issue a *mandamus* commanding the company to pay the sum recovered and costs, though it appears that the company had no assets: *R. v. Victoria Park Company* (2). For similar reasons, a *mandamus* is not obtainable in cases where there is a remedy by distress: *R. v. London and Black Wall Railway Company* (3). These cases recognise the doctrine that a *mandamus* will lie to prevent a failure of justice upon reasons of public policy, to preserve peace, order and good Government, correct official inaction, and enforce official function, but only in cases of last necessity, where the usual forms of procedure are powerless to afford relief, where there is no other clear, adequate, efficient and speedy remedy; in other words, as stated by the Supreme Court of the United States in *Kendall v. Stokes* (4), where the petitioners may have relief in an ordinary Civil action, *mandamus* will not lie: *R. v. Severn* (5); see also *Bank of Bengal v. Dinonath Roy* (6), *In re Bombay F. I. Company* (7),

(1) (1747) 1 Wilson 209.

(2) (1841) 1 Q. B. 288;  
 55 R. R. 249.

(3) (1845) 3 D. & L. 399;  
 71 R. R. 849.

(4) (1843) 3 Howard 87.

(5) (1819) 2 B. and Ald. 645.

(6) (1881) I. L. R. 8 Cal. 166.

(7) (1892) I. L. R. 16 Bom. 398.



*R. v. Stepny Borough Council* (1). The second objection, therefore, which goes to the root of the matter, must be sustained.

In the third place, no order will be made, unless the Court is satisfied that the doing of or forbearing from the act is consonant to right and justice, and such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person against whom the order is sought. In the present case, before the Court could hold that the act sought to be done is clearly incumbent upon the members of the Board of Revenue, we should have to determine that the plaintiff is the rightful owner of the Dumraon Raj estate: but that is the very matter in controversy between the plaintiff and the infant defendant in the regular suit. No doubt, the plaintiff has obtained a decree in the Court of the Subordinate Judge, but the propriety of that decree has to be considered by this Court. It is obviously impossible for this Court to adjudicate, for the purposes of this application, upon the very question in controversy between the parties in the appeal. It is an elementary principle that the title to property will not be tried in *mandamus* proceedings, and the writ will not issue, when it is necessary to try or decide complicated or extended questions of fact: *United States v. General Land Office* (2), *Gregory v. Blanchard* (3). The third objection must, therefore, prevail.

In the fourth place, it has been contended, that the application ought not to be entertained, because the specific act required to be done is not to be done within the local limits of the ordinary original jurisdiction of this Court, as no part of the Dumraon Raj estate is situated within such local limits. The learned counsel on behalf of the petitioner has, however, argued that this circumstance is immaterial, because the members of the Board of Revenue reside within the local limits mentioned, and all that is required is that a notification should be issued by them in the official Gazette that the estate has been released. The substance of the argument is that the

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(1) (1902) 1 K. B. 317.

(3) (1893) 98 Cal. 311;

(2) (1866) 5 Wallace 562.

33 Pacific 656.

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order declaring the infant a ward of Court and directing possession to be taken on his behalf was made within the jurisdiction of this Court, and an order for withdrawal of the original order may similarly be directed to be made here. In support of this view, reliance has been placed upon the decision of the Bombay High Court in *Re Haji Hassam Mahomed* (1). This case does support the view that the act required to be done, in so far as it may be done within the local limits of the ordinary original civil jurisdiction of this Court, namely, the issue of an order of cancellation of the original order, might, if a good case were made out, be directed under section 45 of the Specific Relief Act. It is not necessary, however, to deal with this matter in further detail nor to arrive at a final decision upon this point, because the application must fail upon the other grounds mentioned. In our opinion, the Rule must be discharged, and as the application has been wholly misconceived, it must be dismissed with costs.

*Rule discharged.*

S. C. G.

Attorneys for the petitioner: *Manuel & Agarwalla.*

Attorneys for the opposite party: *Sanderson & Co.*

(1) (1902) 4 Bom. L. R. 773.

## SPECIAL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice.  
Mr. Justice Brett and Mr. Justice D. Chatterjee.

EMPEROR

v.

LALIT MOHAN CHUCKERBUTTY AND OTHERS.\*

1911

April 19.

*Conspiracy to wage War—Penal Code (Act XLV of 1860), s. 121A—Whether persons charged with one Conspiracy, can be found guilty of different Conspiracies—Charge of Conspiracy—Acquittal, effect of—Whether person acquitted can be charged with same offence as part of a conspiracy—Discharge, effect of—Accomplice—Corroboration—Verification Proceedings, whether corroboration of accomplice or confession—Confession, relevancy of, against Co-accused—Evidence Act (I of 1872) s. 30—Retracted Confession, unreliability of.*

Where the accused were charged with conspiracy with persons "known and unknown":—

*Held*, that if the persons were "known," they should be named in the charge.

Where a person has been tried for a specific offence and acquitted, and he is subsequently charged with conspiracy of which that offence is alleged to form a part:—

*Held*, that an acquittal is conclusive; and it would be a very dangerous principle to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates.

*Rex v. Plummer* (1) referred to.

The course of not making completed offences the subject of a separate trial, but of throwing them into a case of conspiracy, though lawful, is not to be commended.

Before the testimony of an accomplice can be acted on, it must be corroborated in material particulars. There must be corroboration not only as to the crime, but also as to the identity of each one of the accused. This is no technical rule, but one founded on long judicial experience.

For a conspiracy to wage war, no act or illegal omission is necessary; the agreement of two or more will suffice.

While admissions, which include confessions, are by s. 21 of the Evidence Act, 1872, declared *relevant* and may be proved as against the persons making them, all that s. 30 of the Evidence Act provides is that the Court *may* take them into consideration as against other

\* Trial by a Special Tribunal constituted under Act XIV of 1908.

(1) [1902] 2 K. B. 339.

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persons. This distinction of language is significant, and shows that the Court can only treat a confession as lending assurance to other evidence against a co-accused, and a conviction on the confession of a co-accused alone would be bad in law. Moreover, under s. 30, that only can be taken into consideration which is a confession in the true sense of the term, so that to place any reliance on a retracted confession against a co-accused would be most unsafe.

*Yasin v. Emperor* (1), referred to.

Verification proceedings do not add any value to an approver's evidence or to confessions, and cannot be regarded as corroboration.

A discharge is not binding on the Court, for it is not equivalent to an acquittal. Still a discharge means that the Magistrate, after taking the evidence, found that there were not sufficient grounds for committing the accused for trial.

A retracted confession cannot ordinarily take the place of legal proof.

Where several persons are charged with the same conspiracy, it is a legal impossibility that some should be found guilty of one conspiracy and some of another, and any accused not shown to be a member of that conspiracy is entitled to demand an acquittal.

The inquiry in this case commenced with the arrest of Lalit Mohan Chuckerbutty on the 27th October, 1909. Lalit, who was made an approver, gave evidence before Mr. H. A. Duval, the committing Magistrate. After the magisterial inquiry under the Criminal Law Amendment Act (XIV of 1908), forty-six accused, Nani Gopal Sen Gupta and others, were committed by Mr. Duval, by his order dated 20th July, 1910, for trial under sections 121A, 122 and 123 of the Indian Penal Code, before a Special Tribunal of the High Court constituted under Act XIV of 1908. Before the Special Tribunal the charge under section 123 was dropped and the accused were charged under the other two sections with having conspired with the persons named in the indictment "and with certain other persons known and unknown" to wage war against His Majesty the King-Emperor, etc. A preliminary objection was taken on behalf of the accused that the indictment was bad as being too vague, inasmuch as if the persons with whom the accused were alleged to have conspired were "known" they should be named in the indictment, and after the point had been argued, it was held that if the persons' names were known, they must be mentioned in the charge.

The charges were thereupon amended by striking out the words "known and" from the indictment and putting in the names of those with whom the accused were alleged to have conspired, and the charges, as amended, were as follows:—

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"That you, Noni Gopal Sen Gupta, Bhuban Mukherji, Bhutan Mukherji, Bistupado Chatterji, Jogesh Chandra Mitter, Atul Mukherji, Gonesh Das, Norendra Nath Bose, Harendra Nath Banerji, Soilendra Kumar Das, Rajani Bhattacharyya, Indu Kiron Bhattacharyya (*alias* Chakravarti), Tinkowri Das, Chuni Lal Nandi, Bidhu Bhusan Biswas, Sushil Kumar Biswas, Manmatha Nath Biswas, Bijoy Chakravarti, Srish Chandra Sircar, Norendra Nath Bhattacharyya, Bhusan Chandra Mitter, Bimola Charan Deb, Sarat Chandra Mitter, Suresh Chandra Mitter, Upendra Nath De, Kalipado Chakravarti, Soilendra Nath Chatterji, Dasarathi Chatterji, Shibu Hazra, Atul Pal, Manmatha Nath Rai Chaudhuri, Kiron Chandra Rai, Nibaran Chandra Majumdar, Suresh Chandra Mazumdar, Joindra Nath Mukerji, Charu Chandra Ghose, Pulin Behari Sirkar (*alias* Mitra), Ramapodo Mukerji, Bhu-  
pendra Rai Chaudhuri, Tara Nath Chaudhuri, Kartik Chandra Dutt, Pabitra Dutt, Annoda Rai, Norendra Nath Chatterji, Satish Chandra Mitter and Haripodo Adhikari, between the Christian years 1905 and 1910, both inclusive, at Sibpur, in the District of Howrah, and at other places in British India, did conspire with one another and with other persons, to wit the following, Lalit Mohan Chukerbutty, Jotindra Nath Hazra, Satish Chandra Sirkar, Birendra Nath Dutta Gupta, Barindra Kumar Ghosh, Hem Chunder Das, Ullaskar Dutt, Abinash Chundra Bhattacharji, Sishir Kumar Ghosh and other persons unknown, to wage war against His Majesty the King-Emperor and deprive the King-Emperor of the sovereignty of British India and to overawe by means of criminal force or show of criminal force the Government of India by law established, and thereby committed an offence punishable under section 121A of the Indian Penal Code, and within the cognizance of the High Court at Fort William in Bengal under the provisions of Act XIV of 1908.

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“Secondly:—That you, the said Noni Gopal Sen Gupta, Bhuban Mukherji, Bhutan Mukherji, Bistupado Chatterji, Jogesh Chandra Mitter, Atul Mukherji, Gonesh Das, Norendra Nath Bose, Harendra Nath Banerji, Soilendra Kumar Das, Rajani Bhattacharyya, Indu Kiron Bhattacharyya (*alias* Chakravarti), Tinkowri Das, Chuni Lal Nandi, Bidhu Bhusan Biswas, Sushil Kumar Biswas, Manmatha Nath Biswas, Bijoy Chakravarti, Srish Chandra Sircar, Norendra Nath Bhattacharyya, Bhusan Chandra Mitter, Bimola Charan Deb, Sarat Chandra Mitter, Upendra Nath De, Suresh Chandra Mitter, Kalipado Chakravarti, Soilenda Nath Chatterji, Dasarathi Chatterji, Shibu Hazra, Atul Pal, Manmatha Nath Roy Chowdhry, Kiron Chandra Rai, Nibara Chandra Mazumdar, Suresh Chandra Mazumdar, Jotindra Nath Mukherji, Charu Chandra Ghose, Pulin Behari Sirkar (*alias* Mitra), Ramapada Mukherji, Bhupendra Rai Chaudhuri, Tara Nath Roy Chowdhry, Kartik Chandra Dutt, Pabitra Dutt, Anoda Rai, Norendra Nath Chatterji, Satish Chandra Mitter and Haripado Akhikari, between the Christian years 1905 and 1910, both inclusive, at Sibpur, in the District of Howrah, and at other places within British India, did collect men, arms and ammunition and did otherwise prepare to wage war with the common intention of either waging war or being prepared to wage war against His Majesty the King-Emperor of India, and thereby committed an offence punishable under section 122 of the Indian Penal Code, and within the cognizance of the High Court at Fort William under the provisions of Act XIV of 1908.”

Of the forty-six accused so charged Bhuban Mukherjee was alleged to be of unsound mind and incapable of making his defence and his trial was adjourned subject to any objection that might be taken on his behalf; Satish Chandra Mitter and Haripado Adhikari were discharged for want of jurisdiction owing to proper sanction not having been obtained for their prosecution under section 196 of the Criminal Procedure Code: Bimola Charan Deb was acquitted, the case against him not being proceeded with; the case against Kiron Rai was dropped



as he became of unsound mind during the hearing of the trial; and finally the prosecution against Jotindra Nath Mukherji and Nibaran Mazumdar (*alias* Karuda) was not proceeded with, owing to certain material evidence on which the prosecution relied to prove the charges against them, having been rejected by the Court as being irrelevant against these accused, and they were acquitted.

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The case for the prosecution was that the accused persons were members of a widespread conspiracy having for its objects the waging of war against the King-Emperor and the overthrow of the British Government in India and having as principal centres of conspiracy the following places in Bengal, *viz.*, Calcutta, Howrah, Sibpur, Kidderpore, Hughli, Rajshahi, Natore, Bankura, Midnapore and Jessore; that the members had bound themselves by a solemn vow to achieve the above named objects, and that the means they adopted to achieve these objects were the collection of (1) men, (2) money, and (3) arms, which were the methods recommended in a revolutionary manuel called *Mukti Kon Pathe*.

1. With regard to the collection of men, it was alleged that the organisers of the conspiracy, following the teachings and methods laid down in the *Mukti Kon Pathe*, appealed to the young men of the country to fight for national independence, and endeavoured to build up public opinion in favour of their teachings and sentiments by means of newspaper writings, national and seditious songs, novels and literature of a revolutionary and seditious character, and by means of *samitis* which they used as recruiting grounds for young men, and secret associations and meeting places at which their plans could be safely discussed and their objects promoted; that for the purpose of collecting men they also organised district bands with the object of educating public opinion and directing public thought towards national liberty. The newspapers employed in carrying out these objects were the *Sandhya*, *Yugantar*, *Bande Mataram*, *Nava Sakti*, *Sonar Bharat* and *Justice*, all of which had been found in the house of one or other of the accused, and all of which had been prosecuted

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and proscribed by the Government, except *Justice* which was edited and printed in England and the sale and importation of which into India were proscribed. As regard the *Yugantar* which was the newspaper principally employed, many of the accused, it was alleged, worked on it and were closely associated with it. The songs by means of which they endeavoured to build up public opinion were chiefly *Sonar Bangla Gan*, and *Bande Mataram* songs, and the literature employed for their purposes consisted chiefly of the *Mukti Kon Pathe* a seditious book compiled from articles from the *Yugantar* newspaper and of which large sales were found in the accounts of the *Chatra Bhandar, Ltd.*, an organisation alleged to have been employed for the purposes of the conspiracy, the *Bartaman Rananiti* (the art of modern warfare) a sequel to the *Mukti Kon Pathe* and also sold by the *Chatra Bhandar* and a copy of which was found on the person of the accused Norendra Nath Bhattacharyya, when he was arrested at Chingripota, *Jaliat Clive* (Clive the forger), *Protapaditta*, a book which was referred to in the *Mukti Kon Pathe*, *Desherkotha*, "Mysteries of Nihilism," "Life of Mazzini," "Thoughts on the French Revolution," *Jatya Samashya*, *Chatrapati Sivaji*, *Bande Mataram*, *Sonar Bangla*, "Social General Strike," and some of the novels of Bankim Chunder Chatterji, notably the *Ananda Math*. Many *samitis* and organisations were employed by the members of the conspiracy as recruiting centres, and several of these under the guise of athletic clubs were merely meeting places at which the members of the conspiracy met their leaders. Of these the principal places were the *Anushilan samiti* at Sibpur, of which the accused Nani Gopal Sen Gupta was alleged to be the leader, "the Mozilpur Young Men's Association," the *Atmonnati samiti* at Bow Bazar, Calcutta, where the approver Lalit was taken and which was under the leadership of one Prohash Dey, the *Mathri Shebak samiti* at Benares alleged to have been started by the young men who went from Manicktollah garden, the *Ram Krishna Sebasram* at Nattore, which was started by the approver Lalit, the *Kalikapur samiti* in the 24-Pergunnahs, the

*Santi samiti* at Rajshahi, the *Debi Bhandar* at Hughli, the Kidderpore *Anushilan samiti*, the *Bandhab samiti* at Singhti near Kurchi, and the *Chatra Bhandar* at Calcutta. In addition to these *samitis* and organisations there were also several secret meeting places used by the members of the conspiracy. Of these the principal places were Ashotosh Banerji's house in Howrah, Prokash Bose's house in Mozilpore, No. 77-2, Sikdar Bagan Lane, Calcutta, Indra Nandy's house at 37, College Square, the Muraripukur garden (Manicktollah garden, the scene of arrest in the Alipore conspiracy case), the accused Dr. Sarat Mitter's house at 86-1, Diamond Harbour Road, the accused Noni Gopal Sen Gupta's house at Chaudhuripara, Sibpur, the accused Bhuvan Mukherji's house at Sibpur, the accused Bhutan Mukherji's house at Sibpur, the Aryya Chemical Factory at Krishnagar, Nadia, and at Chendapathar in Bankura.

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2. With regard to the collection of money, it was alleged that the organisers of the conspiracy advocated the commission of dacoities and the robbing of Government treasuries, which was also advocated in Bankim Chunder's *Ananda Math*, as a means of obtaining money to carry on a revolution and wage war against the King-Emperor in India, and that the accused had in fact committed or participated in a large number of dacoities for this purpose, all of which were characterised by the fact that they were committed by young men of the *bhadralog* class. The dacoities which were alleged to be the work of this conspiracy were:—

(a) The Chingripota dacoity committed at Chingripota Railway Station, E.B.S.R., on the 6th December, 1907. The accused Norendra Nath Bhattacharyya was tried for this dacoity and discharged by the Deputy Magistrate of Sealdah. According to the approver Lalit this dacoity was the work of the *Atmonnati samiti*, and it was alleged that the accused Bhuvan Chandra Mitter had taken part in it with Norendra and others.

(b) The Sibpur dacoity committed by certain *bhadralogs* on the 3rd April, 1908. The accused Norendra Nath Chatterji

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had been arrested and identified by a witness but was discharged. According to the approver Lalit a large number of the accused took part in this dacoity, but his evidence was uncorroborated, and reliance was not placed by the prosecution on this dacoity.

(c) The Barah dacoity committed on the 2nd June, 1908. The approver Lalit was sent to Dacca to fetch the loot obtained from this dacoity and went to the house of Sarat Ch. Ghose, a pleader, and brought the loot to Calcutta. The accused Kartick Dutt was tried for the dacoity and acquitted.

(d) The Bighati dacoity committed on the 16th September, 1908. The accused Kartick Dutt, Suresh Chandra Mitter and Suresh Chandra Mazumdar, had been tried and convicted by a Special Tribunal of the High Court, and sentenced, the first to six years, and the other two to five years' rigorous imprisonment respectively upon the evidence, amongst others, of Panna Lall Chatterji, who had turned approver, and who was also a witness in the present case, and according to whom the accused Kartick Dutt was a member of the "*Yugantar* gang."

(e) An attempted dacoity at Protapchuck on the 14th October, 1908. According to the approver Jotin Hazra this dacoity was planned by the conspirators in Calcutta and a number of the accused took part in it. The attempt, however, failed as the villagers turned up and offered resistance.

(f) The Raita dacoity committed on the 29th November, 1908. The accused Sushil Biswas made a confession implicating himself and the accused Manmatha Nath Biswas, Ramapado Mukherji, Bhupendra Narain Rai Chaudhuri, and Bidhu Bhusan Biswas, but he subsequently retracted it.

(g) The Morehal dacoity committed on the 2nd November, 1908. The approver Jotin Hazra implicated Dasarathi Chatterji, Shibu Hazra and Atul Pal. The accused Haripado Adhikari and the approver Jotin Hazra confessed, and they with Dasarathi Chatterji and Manmatha Nath Rai Chaudhuri were tried at the Hughli sessions with a jury, and were ac-

quitted, but on a reference to the High Court, Manmatha Nath Rai Chaudhuri was sentenced to seven years' rigorous imprisonment.

(h) Two dacoities at Musapore committed on the 27th February, 1909, in neighbouring houses. According to the approver Lalit it was the work of the conspirators and he implicated a number of accused as being concerned in it.

(i) The Netra dacoity committed on the 23rd April, 1909. The approver Lalit was first arrested in connection with this dacoity, and both he and the accused Soilendra Kumar Das spoke to having taken part in it. Lalit at first named twenty-one out of the forty-six accused as being implicated in this dacoity.

(j) The Maharajpur dacoity committed on the 27th July, 1909, in the house of a widow by *bhadralogs*.

(k) The Haludbari dacoity committed on the 28th October, 1909. The accused Soilen Das, Sushil Biswas, Atul Mukherji, Kiran Rai, Gonesh Das, Soilendra Chatterji and Upendra Kristo Deb, were tried by a Special Tribunal of the High Court and sentenced, the first two to seven years, and the rest to eight years' rigorous imprisonment respectively, while the accused Bidhu Bhusan Biswas and Manmatha Nath Biswas who were tried with them, were acquitted.

3. With regard to the collection of arms, it was alleged that the conspirators collected arms and ammunition at the Muraripukur garden, and smuggled them secretly from foreign countries. Of this there was evidence that the revolver with which Profulla Chaki committed suicide when about to be arrested for the murder of the Kennedys at Muzafferpore, could not be traced as having come into India, through any recognized agents or importers of arms in Bengal. It was also alleged that arms and ammunition were found in the possession of some of the accused or at the scene of the dacoities alleged to have been committed in furtherance of the conspiracy. Of these the principal instances were the finding of a large quantity of arms and ammunition in a steel trunk belonging to the accused Tara Nath Roy Chowdhry at 4, Raja's Lane, Cal-

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cutta, on the 19th May, 1908; the cartridges found in a field near the scene of the Netra dacoity; a revolver found in the possession of the accused Shibu Hazra on the 19th May, 1909; cartridges found in the possession of the accused Soilen Das and Kiron Rai on the 30th October, 1909; a cartridge found in the possession of the accused Bimola Deb; guns found in a field near the scene of the Haludbari dacoity which were pointed out by the accused Soilen Das; a quantity of gun powder and cartridges found in the possession of the accused Bhupendra Narain Rai Chaudhuri; four revolvers found in the possession of the accused Bijoy Chakravarti in consequence of information supplied by the approver Lalit; and the revolver employed in the murder of Inspector Shamsul Alum on the 24 January, 1910, which was alleged to have been stolen by the accused Suresh Chandra Mazumdar *alias* Poran from one Rai Purna Chandra Moulik Babadur when on a visit to a friend in Calcutta, in December, 1909. It was alleged that at Chendapathar Rukini Rai was seen with a revolver and had some bows and arrows made by the local villagers, and that some Babus (alleged to be accused) went in for target practice and shooting at the Salt Lakes, and at Kuleswar near Diamond Harbour. The approver Lalit also spoke to two journeys for rifle practice to Kakdwip and Kuleswar about Christmas 1908; and some witness stated that they saw the accused Charu Ghose and some young men on their way to, and at, Kuleswar, shooting.

In addition to the dacoities already mentioned the other overt acts alleged to have been committed in pursuance of this conspiracy were:—

(i) The murder of the Kennedys at Muzafferpore on the 30th April, 1908, by Khudiram Bose, and Profulla Chaki, whose photographs, it was alleged, were found in the house of a number of the accused, and who were regarded by the conspirators as martyrs in the work of the freedom of the country.

(ii) The murder of Inspector Nanda Lal Banerjee on the 9th November, 1908, in Serpentine Lane, during the hear-



ing of the Alipore Bomb Case, for the purpose of giving evidence in which he used to attend the Alipore Court. According to the approver Lalit he, under directions from his leader Noni Gopal Sen Gupta, watched and reported Nanda Lal Banerjee's habits and movements to Noni, and the accused he implicated in it were Noni Gopal Sen Gupta, Bhushan Mitter, Charu Chandra Ghose, Jogesh Mitter and Narendranath Bose.

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(iii) The murder of Deputy Superintendent Moulvie Shamsul Alum by one Birendra Nath Dutta Gupta on the 24th January, 1910, in the corridor of the High Court, Calcutta, whilst he was attending that Court in connection with the appeal in the Alipore Bomb Case. The revolver with which the murder was committed was alleged to have been stolen by the accused Suresh Chunder Mazumdar *alias* Poran from Rai Purna Chandra Moulik Bahadur, while on a visit to a friend in Calcutta. According to a statement of the approver Lalit, made on the 26th March, 1910, Birendra was a member of the conspiracy. Birendra was tried by the Sessions of the High Court and sentenced to death, and two days before his execution he made a statement before Mr. D. Swinhoe, Officiating Chief Presidency Magistrate of Calcutta, implicating the accused Jotindra Nath Mukherji and one Satish, and gave evidence the day previous to his execution before Mr. Swinhoe in the Presidency Jail, Calcutta, in the presence of Jotindra Nath Mukherji and his counsel, which statement and evidence the prosecution sought to use as evidence against these accused, but which was rejected by the Court.

(iv) The attempted seduction of the sepoys of the 10th Jats from their allegiance. It was alleged that the conspirators had attempted to induce one Surjan Singh and Chunai Havildar to join the conspiracy, and according to Lalit they were members of the Secret Society. Surjan Singh, who was called as a witness, stated that he and one Ram Gopal had been taken by the accused Norendra Nath Chatterji to the house of the accused Bhutan and Bhutan Mukherji at Sibpur, and was there made to take the vow and initiated. Ram

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Gopal also gave evidence with regard to this incident. It was also alleged that Surjan Singh was given sums of money on three separate occasions, once by the accused Norendra Nath Chatterji, and twice by the approver Lalit; that these men of the 10th Jats visited the accused Sarat Mitter, and that the accused Norendra Nath Chatterji went to the Punjab with Surjan Singh and subsequently lived at Lahore. The accused alleged to have been implicated in this offence were Nani Gopal Sen Gupta, Bhutan and Bhuban Mukherji, Dr. Sarat Mitter and his brothers Suresh and Satish, and Norendra Nath Chatterji.

It was also alleged that the *Chatra Bhandar* and the *Yugantar* were two important limbs of the conspiracy. The *Chatra Bhandar* was started in 1903 as a Students' Co-operative Stores Association, and in August 1906, it was converted into a limited liability company. In its origin it was admittedly an innocent concern, but according to the prosecution the members of the conspiracy subsequently employed it to further their ends, by using it as means to obtain money for the purpose of the conspiracy, by using it as a sort of bank in which members of the conspiracy deposited money and through which they paid money to other members for the purposes of the conspiracy, and by using it as a rendezvous where the conspirators could meet each other secretly and with safety. It was also alleged to have been closely connected with the *Yugantar* which it advertised on the cover of its prospectus, and to have helped the conspiracy by the sale of such books as *Mukti Kon Pathe*, *Bartaman Rananiti*, and *Jatiya Samashya*, which showed its character and identified it as a limb of the conspiracy. The accused Annoda Prosanna Rai was a director of the company, and the accused Pabitra Charan Dutt was managing director, and the names of several of the accused appeared in the books of account as having had dealings and transactions with it, and having paid money into it, and through it, to each other.

With regard to the *Yugantar* which was started in March, 1906, and which at one stage of its career had a phenomenal

sale in Calcutta, it was alleged by the prosecution that the accused Tara Nath Roy Chowdhry and Kartick Dutt were connected with it, that several copies of it were found with some of the accused in their house searches, and that *Mukti Kon Pathe* was compiled from a collection of the most inciting and inflammatory articles which appeared from time to time in the *Tugantar*.

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For the convenience of dealing with the case and presenting the evidence before the Court, the prosecution divided the accused into several groups according to the locality they came from or were most closely identified with, and according to their most frequent association with each other, and it was alleged that there was evidence to connect the members of each group with one another, and the different groups with each other as parts of one conspiracy. The groups were as follows:—

(i) The Sibpur group consisting of Noni Gopal Sen Gupta, Bhuban Mukherji, Bhutan Mukherji *alias* Kristo Dhan, Bistopado Chatterji, Jogesh Mitter *alias* Madaru, and Norendra Nath Chatterji *alias* Bholanath; (ii) The Kurchi group consisting of Jotin Hazra (the second approver), Shibu Hazra, Atul Pal, Dasarathi Chatterji, Haripada Adhikari and Manmatha Nath Rai Chaudhuri; (iii) The Kidderpore group consisting of Sarat Mitter, Suresh Mitter, Satish Mitter, Bimola Charan Deb, and Charu Chunder Ghose; (iv) The Chingripota group consisting of Bhusan Mitter *alias* Guley and Norendra Nath Bhattacharyya; (v) The Mozilpur group consisting of Rajoni Bhattacharyya, Indu Kiron Bhattacharyya, Tinkowri Das and Chuni Lal Nundy; (vi) The Haludbari group consisting of Soilendra Kumar Das, Sushil Kumar Biswas, Bidhu Bhusan Biswas, Manmatha Biswas, Atul Chandra Mukherji, Kiran Chandra Rai, Gonesh Chandra Das, Soilendra Nath Chatterji, and Upendra Krishna Deb; (vii) The Krishnagar group consisting of Jotindra Nath Mukherji, Suresh Chandra Mazumdar *alias* Poran, and Nibaran Chandra Mazumdar *alias* Karuda; (viii) The Nattore group consisting of Srish Chandra Sircar and Bijoy Kumar Chakravarti; (ix) The Jowgacha group

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consisting of Kalipada Chuckerbutty and Pulin Sircar; (x) The *Yugantar* group consisting of Kartick Dutt and Tara Nath Roy Chowdhry; (xi) The Chatra Bhandar group consisting of Pabitra Charan Dutt, Annoda Rai, Norendra Nath Bose, and Harendra Nath Bauerjee; (xii) The Raita group consisting of Ramapada Mukherji and Bhupendra Narain Rai Chaudhuri; and (xiii) The Muraripukur garden group consisting of the following persons whom the accused were charged as having conspired with, and who were all convicted in the Ali-pore Bomb Case, *viz.*, Sirish Kumar Ghose, Hem Chunder Das, Ullaskar Dutt, Barindra Kumar Ghose, and Abinash Chandra Bhattacharyya.

The evidence on which the prosecution chiefly relied to connect the accused with the conspiracy consisted of the evidence of the two approvers, Lalit Mohan Chuckerbutty and Jotin Hazra, the confessions of the accused Soilendra Kumar Das, Sushil Kumar Biswas, and Tara Nath Roy Chowdhry, which the prosecution sought to use as evidence against the rest of the accused under section 30 of the Evidence Act; and evidence of frequent association among the accused in *samitis*, music, gymnastic exercises, shooting and target practice, and *lathi* play, all of which were alleged to be of an incriminating character.

The confessions of Soilendra Kumar Das, consisted of three statements made respectively on the 29th October, 1909, before a Magistrate at Kushtia, on the 21st December, 1909, before the District Magistrate of Nadia at Krishnagore, and on the 9th and 10th March 1910, also before the District Magistrate at Krishnagore. Of these the most important was the third confession, in which he implicated a number of the accused, gave an account of the Netra dacoity, and named some of the accused as having been concerned in the Morehal dacoity. Before the committing Magistrate, however, Soilen retracted these confessions fully, alleging that they had been extorted from him by threats by the police, and stating that he was not aware of a single fact mentioned in them, nor did he know the persons he had named in them, and that he would

not have made the statements had he known that they would be used as evidence against him. The substance of his third confession is thus set out by the committing Magistrate:—"In that statement he says he was initiated at Bankura in 1906, where he practised target shooting with Ram Das Chuckerbutty. In 1908 he came to Calcutta, where he met Gonesh Das, an old school-fellow, and Harendra Banerjee. He was initiated by Noni Gupta at the Botanical Gardens, Sibpur. He was present at the Netra dacoity, knew of the attempt to seduce the 10th Jats from their allegiance, attended target practice at the Salt Lakes with Charu Ghose and Kiron Rai, and knew of the Morehal dacoity. He speaks of Noni Gupta as his leader, acting under, he believed, the advice of Arabinda Ghose. Of the accused he knew Noui, Gonesh and Harendra Banerji, Lalit Chuckerbutty, Bhuban and Bhutan Mukherji, Noren Chatterji *alias* Bholanath, Sarat Mitter, Suresh Mitter, Jogesh Mitter *alias* Madaru, Bistupado Chatterji, Pabitra Dutt, Upen Dey, Atul Mukherji, Hari Das Chuckerbutty, and a very strong Babu of the Bengal Secretariat living at Musjidbari Street, who would appear to be Jatindra Nath Mukherji, also Shibu and Jotin Hazra, and Manmatha Nath Rai Chaudhuri."

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The confession of Sushil Kumar Biswas consisted of two statements made respectively on the 14th December, 1909, and 27th December, 1909, before the District Magistrate at Krishnagar. In the first confession he gave an account of the Haludbari dacoity for which he had been arrested at Belia-shishi on the 7th November, 1909, and in the second confession he gave an account of the incidents leading up to the commission of the Raita dacoity, in the actual commission of which however he took no part. Sushil subsequently retracted these confessions before the Special Tribunal.

The confession of the accused Tara Nath Roy Chowdhry was objected to before the Special Tribunal on the grounds that it was not a confession at all inasmuch as in it he endeavoured to exculpate himself, and that he had not made it voluntarily, and had subsequently retracted it. It was, however, decided that it was a confession and was voluntarily

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made, and it was admitted as relevant against Tara Nath only. [This confession had been objected to at the previous trial of Taranath Roy Chowdhry under the Arms Act, before Brett J. and a common jury at the High Court Sessions, and was held by his Lordship to be admissible. The jury, however, disagreed in the proportion of 6 to 3 in favour of the accused. Brett J. refused to accept the verdict of the majority and Taranath was retried by Woodroffe J. and a common jury. At the retrial the confession was again objected to, and held to be inadmissible: see *Emperor v. Taranath Roy Chowdhry* (1). The jury this time disagreed in the proportion of 7 to 2 against the accused, and he was sentenced to 3 years' rigorous imprisonment.]

The prosecution sought to use these confessions not only against the makers thereof, but also against the rest of the accused under section 30 of the Evidence Act. They were, however, only admitted as *relevant* against their makers (*vide* judgment).

The evidence of the approvers, Lalit Mohan Chuckerbutty and Jotin Hazra, and the evidence of association are dealt with in the judgment.

The case for the defence was that the evidence of the approvers was contradictory, false, and untrustworthy, and could not be relied upon; that in any event it was merely the evidence of accomplices and required corroboration in material particulars both with regard to the overt acts and the identity of the accused with the conspiracy, and that such corroboration was not forthcoming; that so far as the dacoities were concerned there was no independent evidence to show that they were committed in pursuance of the conspiracy, or to show that the accused were concerned in any of them, except the Haludbari dacoity; that so far as the murder of the two police officers was concerned there was no independent evidence to connect any of the accused with them; that so far as the incident of the 10th Jats was concerned, the witnesses Surjan Singh and Chunai Havildar were accomplices,



and their evidence could not be accepted without corroboration which was not forthcoming, that the evidence of Ram Gopal was contradictory and inconclusive and could not be safely acted on, and that in any event there was no reliable evidence to connect any of the accused with the incident; that so far as the *Chatra Bhandar* was concerned it was always an innocent institution, and was never used for the purposes of the conspiracy, that the money paid into it and through it by the accused had nothing to do with the conspiracy, and that the books sold by it, on which the prosecution relied as indicating its criminal character, really proved nothing, inasmuch as it also sold a large number of other books which were admittedly of an innocent character; that so far as the *Yugantar* was concerned it was never a limb of the present conspiracy, and even if some of the accused were shown to be connected with it, that did not establish their connection with the conspiracy, and that the mere fact that copies of the *Yugantar* were found with some of the accused did not establish their guilt, inasmuch as the evidence showed that at one period of its existence it had a phenomenal circulation and was not till late in its career proscribed by the Government; that so far as the association among the accused was concerned, the evidence did not show that it was of an incriminating character, but on the contrary it merely pointed to such association as one would expect to find among young men living in the same village and having interests in common, and that such association was not *per se* sufficient to establish the guilt of the accused or connect them with the conspiracy. And that, even if some of the accused were found to be guilty of isolated acts alleged against them, it was not proved that those acts were performed in pursuance of the conspiracy, or that the persons participating in them were connected with the conspiracy.

Mr. P. L. Roy, Mr. L. P. E. Pugh, Mr. E. Keays, Mr. J. Chatterjee and Mr. Charles Bagram, instructed by Mr. J. T. Hume, Public Prosecutor, for the Crown.

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*Mr. J. N. Roy* and *Mr. B. C. Chatterjee*, for Noni Gopal Sen Gupta, Bistupada Chatterjee, Norendra Nath Bose, Nibaran Chandra Mazumdar, Suresh Chandra Mazumdar, Jotindra Nath Mukherji, Pobitra Dutt, Sarat Chandra Mitter, Suresh Chandra Mitter, Satish Chandra Mitter, Shibu Hazra and Haripado Adhikari.

*Mr. S. P. Sen Gupta*, for Norendra Nath Bhattacharyya and Annada Prasanna Roy.

*Mr. E. P. Ghose* and *Mr. N. C. Sen*, for Bimola Charan Deb.

*Mr. J. K. Surita*, for Kalipado Chakravarty and Pulin Behari Sircar.

*Mr. J. C. Bagchi*, for Harendra Chandra Banerjee.

*Mr. P. C. Sen*, for Bhutan Mukherji and Charu Chandra Ghose.

*Mr. J. N. Sinha*, for Chuni Lal Nundy, Bhusan Chandra Mitter, Ramapado Mukherji and Atul Pal.

*Mr. S. K. Sen*, for Jogesh Mitter, Gonesh Das, Sailen Das, Rajani Bhattacharyya, Indu Kiron Bhattacharyya, Tin-cowri Das, Manmatha Biswas, Srish Chandra Sircar, Norendra Nath Chatterjee, Bidhu Bhusan Biswas, Bejoy Chakravarty, Dasarathi Chatterjee, Soilen Chatterjee and Bhupendra Rai Chaudhuri.

*Mr. B. C. Chatterjee*, by permission of the Court, addressed on behalf of the following accused who were undefended: Kartick Dutt, Tara Nath Roy Chowdhry, Manmatha Chaudhuri, Sushil Kumar Biswas, Atul Mukherjee and Upendra Nath Dev.

*Cur. adr. vult.*

JENKINS C.J. Forty-six accused have been committed to this Court for trial under section 6 (b) of Act XIV of 1908, and the charges against them are under sections 121A, 122 and 123 of the Indian Penal Code.

Of these the principal charge is that under section 121A, of conspiracy to wage war against His Majesty the King-Emperor, and deprive the King-Emperor of the sovereignty of British India, and to overawe by means of criminal force.

or show of criminal force, the Government of India, as by law established. The charges under the other sections are subsidiary, and have not been discussed before us. The period of the conspiracy, as charged, is "between the Christian years 1905 and 1910 both inclusive," and the accused are charged with having conspired at Sibpur in the District of Howrah, and at other places in British India.

Of the 46 accused so charged, Bhuban Mukherjee is alleged to be of unsound mind, and consequently incapable of making his defence, and an application has been made to us, under section 465 of the Criminal Procedure Code. As against him we have directed an adjournment of the trial subject to any objection that may be taken on his behalf.

The accused Satish Chandra Mitter and Haripado Adhikari have been discharged for want of jurisdiction, by reason of the failure of the prosecution to observe the provisions of section 196 of the Criminal Procedure Code. The accused Bimola Deb has been acquitted at the instance of the prosecution, on the ground that there was no case against him.

The case against Kiran Rai has been dropped, not for lack of evidence, but because his mental condition appeared to be such that the prosecution against him could not properly be continued; and, in adopting this course, Mr. P. L. Roy was influenced, and properly influenced, by the fact that this accused had already been sentenced to eight years' rigorous imprisonment for the Haludbari Dacoity, which is alleged to be a part of this conspiracy.

Counsel for the Crown also determined not to proceed with the prosecution against Jotindra Nath Mukherjee and Nibaran Mozumdar *alias* Karuda, as the relevant evidence he was able to adduce against them was not sufficient to support a conviction.

The case for the prosecution is that the accused were members of a vast conspiracy, organised and working in secrecy, and aiming at the overthrow of the British Government: that, though the period of the conspiracy mentioned in the charge was between 1905 and 1910 both inclusive, the movement com-

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menced earlier: that the principal centres of the conspiracy were Calcutta, Sibpur, Kidderpore, Nattore, Hooghly, Bankura, Midnapur and Jessore: that the scheme of the conspiracy required the collection of men, arms and money, and that an actual start in this direction was made: that men were recruited and arms and ammunition collected, that to obtain funds dacoities were committed, and *swadeshi* shops were started. As a part of the conspiracy, it is said, many crimes were committed, for the prosecution would ascribe to the conspiracy a number of dacoities attempted or committed, the murder of two police officers, and one informer, the endeavour made to seduce troops from their allegiance, and other minor offences. Many of these offences have actually been the subject of judicial investigation and adjudication, and several of the accused have already been convicted, acquitted or discharged, in respect of them. Where there has been an acquittal, there has of course been no further discussion, for the acquittal is conclusive, and indeed it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates: *Rex v. Plummer* (1).

In other cases we have been compelled, by the course the prosecution have seen fit to adopt, to hear the evidence again, in proof of these same offences against the same accused. In other instances completed offences, as for instance the Netra Dacoity, have not been made the subject of a separate trial, as they could and should have been, but they have been thrown into this case, and we have had to investigate them in this trial. It may be that this course was inspired by the idea that, though the evidence at the disposal of the prosecution was insufficient to secure a conviction for the crimes committed, it might serve to secure a conviction for a conspiracy, the proof of which really rested on the establishment of those crimes; there can hardly have been the hope that the Court would be willing to suppose much had been proved, merely because much had been said. Of this, however, I am clear, that the course adopted

(1) [1902] 2 K. B. 339.

is not to be commended, and though it may be lawful, it unquestionably is not expedient. The result has been this trial, and with every effort to curtail its length, it has lasted, and necessarily lasted, for months, so that from the arrest of most of the accused a year and more has passed. The seriousness of this is the greater when it is borne in mind that, during the whole of that time, almost all the accused have been in custody, and that until the close of the magisterial inquiry, they were unrepresented by any legal advisers as a result of the application to this case of the special procedure provided by Act XIV of 1908, an Act "to provide for the more speedy trial of certain offences." I doubt whether, when that Act was passed, it could have been contemplated that a procedure was being sanctioned that would render it possible for accused persons to be incarcerated for months without any access to legal advice.

To establish their case the prosecution called, in the course of the magisterial inquiry, close on 450 witnesses, all of whom and more have been called or tendered in this Court, while the printed exhibits alone cover upwards of 1,100 foolscap pages. The evidence adduced in support of the prosecution's case is in part oral, in part documentary and in part real. The principal and most important oral evidence is that of the approvers Lalit Mohan Chuckerbutty and Jotindra Nath Hazra, but admittedly their testimony, before it can be acted on, must be corroborated in material particulars. The nature and extent of this corroboration is well settled; there must be corroboration not only as to the crime, but also as to the identity of each one of the accused; and ordinarily it must proceed from an untainted source. This is no technical rule, but one founded on long judicial experience, and this case affords a striking illustration of its wisdom, as will be made clear when I come to a discussion of the approvers' evidence.

The documentary evidence consists of books, newspapers, accounts, diaries and letters found for the most part at searches made in the course of this case, or of cognate or relevant cases. We also have before us arms and ammunition that the prose-

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cution seek to connect with one or other of the accused. And finally we have the confessions, of which use is sought to be made under section 30 of the Evidence Act against co-accused.

First, then, it has to be seen whether the conspiracy alleged by the prosecution has been proved. Was there a conspiracy "to wage war against His Majesty the King-Emperor and to deprive the King-Emperor of the sovereignty of British India and to overawe, by means of criminal force or show of criminal force, the Government of India by law established"? A charge so phrased might, and probably would, to the lay mind, imply a political situation of the gravest character, and it is no doubt partly for this reason that the Legislature has prescribed that a charge of this description shall not be entertained except upon complaint made by order of, or under authority from, the Governor-General in Council, the local Government, or some officer empowered by the Governor-General in Council in this behalf.

The proceedings in this case have been initiated by complaint made by order of the local Government: with the policy of that order this Court has no concern. I have hesitated much as to whether it could with any show of reason be said that the evidence has disclosed a conspiracy for so serious an end as waging war against His Majesty, and I have hesitated the more when I have borne in mind the class of men arraigned before us as accused, and the arms that have been disclosed consisting as they do, for the most part of a few revolvers, some muzzle-loading guns, some antiquated and broken pistols and a handful of arrowheads. Even Lalit, when he says that the object was "to make the country independent," adds "there was no immediate hurry." Jotin Hazra seems to have regarded the movement as a means of livelihood, and in proclaiming his repentance he declared that he recognized that all this dacoity business was bad and that he had been worse off since the dacoities than before. Before us he expressed the view that "these dacoities constituted a secret society." Panna Lal, who also professes to have been a member of the conspiracy, declared in his confession to Mr. Patterson, "all



who entered the gang perpetrated swindles in the name of *swadeshi*." Here he improved his story. Still the provisions of the law are comprehensive and it does not require very formidable elements either in men or means to satisfy its definition of a conspiracy to wage war. For the conspiracy with which we are concerned no act or illegal omission is necessary; the agreement of two or more will suffice, so that the determination of the Court that a conspiracy to wage war has been established does not imply, as its terms might suggest, the existence of a serious menace to the constitution or the stability of constituted authority in India. And I think it right to say this in explanation of my conclusion that a conspiracy to wage war has been proved.

So much is made of the evidence of the approvers and so closely and intimately is the success of the prosecution identified with it, that it will be convenient to discuss its value at the outset.

Of the two principal approvers Lalit is the more important and I will deal with him first. His previous record has nothing to commend it: though he is poor and his family poor, he has frankly admitted that he "has never tried to earn an honest penny." He was arrested in Darjeeling on the 27th of October, 1909, and instead of being sent at once to Diamond Harbour, he was kept at Darjeeling for "local enquiry," and did not reach Diamond Harbour until the 2nd November. Then he had interviews with Inspector Shamsul Alum extending over several hours, and though it was understood Lalit was willing to confess even before he left Darjeeling, it was not until the 5th of November that he was taken to the Magistrate to have his confession recorded. No explanation of this delay is forthcoming, and it is a matter both for regret and for comment that the statement recorded by Inspector Shamsul Alum is not forthcoming. No such document could be found. This assurance we, of course, had to accept, but I feel that it might have materially assisted us, had it been possible for the prosecution to place before us either the original record, or a copy of Lalit's first

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statement to Inspector Shamsul Alum. How such an important document (if it ever existed), and all record of its contents have become lost to the Police, it is difficult to understand. That such a statement was recorded seems clear, and counsel for the prosecution was asked by the Court to produce for our inspection some document from which we could learn what Lalit had said to the Inspector. Though it seemed to me improbable that the police authorities would not have somewhere in their possession either the original or a copy of this statement, Mr. P. L. Roy, after search had been made, informed the Court that he was instructed to say, no record of this statement could be found.

Lalit's confession to the Magistrate, Mr. C. C. Chatterjee, is a very remarkable statement, and it is the foundation on which practically the whole of this case is built. For the prosecution it is said that this statement is not a full disclosure of all Lalit knew, and this has to be said, for it is silent as to the many matters to which Lalit has deposed before us.

Lalit's successive statements to the recording Magistrate, to the verifying Magistrate, before Mr. Duval who conducted the inquiry, and finally before this Court, afford so much room for comment that it is difficult to decide where to begin. His evidence-in-chief before this Court was conspicuous for the assurance with which it was given, and the intimate knowledge of the membership and doings of the conspiracy it professed. Offences and outrages that had baffled the detective powers of the police were explained and claimed by him as the work of the conspiracy, and he has painted himself before us as having had a considerable hand in the commission or abetment of dacoities, murder and theft. His knowledge of the personnel of the conspiracy appeared to be extraordinary; before the inquiring Magistrate he gave the names of over 170 persons, indicating in most instances their residences, and yet he has told us he was not an important member of the conspiracy, and to the verifying Magistrate he stated in explanation of his inability to give a particular name and address, "the rule of our *Samity* is not

to ask the name and residence of any member. On this account I do not know the names and residences of many persons." Nor can the achievement of recounting this list of names and residences be explained by a good memory for facts within his experience, for when confronted in his cross-examination with one of his many inconsistencies all he could say was "it is impossible for me to narrate these facts correctly each time." Under the stress of cross-examination the assurance vanished, though he displayed considerable resource as he was dislodged from one after the other of his former statements. It would take too much time to do more than mention a few of the indications of untrustworthiness his evidence affords. First, there is his denial of the brick-burning letter, which it is difficult to regard as anything but deliberate falsehood. He may have felt he was safe in this denial, for the falsehood was one that could not have been discovered, but for the chance that brought this letter into the possession of the defence, a contingency Lalit could not have foreseen. His ingenious explanation of the letter, when he had to admit its authorship, did not impress me. Then there is the change of his story as to the receipt of Rs. 10 by Money Order from Jotin Mukherjee, from which it became necessary to resile when it was discovered that Jotin was at that time at Darjeeling. Next we have him deposing before the Magistrate that he had passed the Entrance Examination from the Diamond Harbour School in 1905, while here he denied that he had made any such statement, and declared that he left when he was promoted to the 2nd class. At one time he says it was his father that paid for his outfit at Darjeeling, at another time that it was Noni Gopal, and when he was confronted with the variation in his story he promptly said both were true.

Then the story of his connection with Benares is remarkable for its changes. At one time he deposes that he went with Haren and Behari Lal, at another that he preceded them: in his examination-in-chief, it seemed as though he went there only once, but in cross-examination, he escapes from the diffi-

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culty this involves, by saying there was more than one visit. At one time he says he, Haren and Behari Lal lived in Ambica's house at Benares for a fortnight, at another he says he thinks he never made any such statement: at one time he declares that he returned from Benares in 1½ or 2 months, at another after working there for 5 months. His story as to his being sent to Dacca for the *Barah* loot is almost as full of contradictions: at one time it is Pabitra and Noni who sent him on this mission, at another Bimola takes Noni's place: at one time he declares that it was while he was living in Indra Nandi's house that he was so sent, although it appears that the dacoity had not then been committed, at another that it was when he returned from Benares in the Autumn of 1908, though the dacoity had then been committed not less than four months before: at one time he was given cartridges and a revolver on this occasion, at another no mention is made of this. Then as to the date of his first coming to Calcutta: before us he declared it was in October 1906, that he first stayed at 46, Machua Bazar Street, that he then moved to the premises of the Calcutta High School, No. 66, Nebutolla Lane; that in Asin or Kartic he was initiated; that he then went to the *Yugantar* and *Chatra Bhandar* Mess, No. 15-1 or 15-2, Bhowani Churn Dutt's Street; that on the very day of his initiation he was entrusted with a revolver to make over to Sakharam Ganesh Deoskar, that on the following day in accordance with instructions, he watched 7, Alipur Lane, and followed a man on a bicycle supposed to be carrying money, and that, after staying two or four days at the *Yugantar* and *Chatra Bhandar* Mess, he was sent by Indra Nath Nandi to Cheddapathar. Before the verifying Magistrate, however, he places his visit to Cheddapathar in 1907. It is true that the date in the Magistrate's record appears to have been altered to 1907, but if this alteration was subsequently made, one thing at any rate is clear, the alteration could not have been made by the defence, for the document was in possession of the police and it was only after repeated efforts that counsel for the defence saw it in the course of the trial in this Court.

But more than this, if the alteration was subsequently made, it was one necessitated by Lalit's statement, at the time, for immediately afterwards he says, in the same statement that, after being two months at Cheddapathar, he returned to Calcutta, and he goes on to describe a long conversation he had as to the Changripota dacoity, and the disposal of the proceeds. And seeing that this dacoity was not committed until December 1907, it is at once patent that if 1907 is a later alteration, it was one necessitated by Lalit's own story. But if October, 1907, be taken as the date of his arrival, then all the events prior to that to which he deposes,—and they are both many and important,—must have been outside his experience. If, on the other hand, he came in 1906, then the conversation as to the Changripota dacoity on his return, must be a fabrication, and it is difficult to repel the suggestion, very pertinently made, that it was a fabrication in which he was instructed for the purpose of bringing in this dacoity as the work of the conspiracy.

Then there is Lalit's story as to the assistance he gave in securing the murder of Nando Lal. If Lalit was in Benares in August, then his version as to how he came to know Nando Lal by sight is false, and with that the whole of his story goes by the board. There are other serious difficulties in the way of accepting his evidence on this point, with which I will deal later, and I will now merely allude to the fact that, though he professes to have watched Nando Lal's house under instructions from Noni, the house he pointed out to the verifying Magistrate as Nando Lal's was No. 25, whereas in fact Nando Lal lived in No. 100-2. Then we have Lalit placing the Musapur dacoity in April, and so placing it, not as an isolated event, but for the purpose of accounting for the abandonment of the second Netra attempt, and yet we know that this dacoity was committed on the 27th February. Then we find that, while he claims an intimate knowledge of those who took part in the Netra dacoity, he points out as parties to it two persons who admittedly had nothing to do with it.

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I have mentioned here only a few of the many indications which go to show how untrustworthy Lalit is, apart altogether from the discredit that attaches to him as an accomplice or as the worthless character he obviously is. When I come to deal with the details of the case it will be necessary for me to refer to many other such instances, and indeed a close examination of his evidence goes to prove that almost all his statements, when capable of being checked, can be shown to be incorrect. There can be no question that Lalit has overdone his part, whatever the reason may be: and if it be said that had he been fabricating a false story he would not have fallen into this error, then I would answer in the words of Lord Brougham:—"This is a very tender argument before a Court, and too doubtful to justify the Court in placing any considerable reliance on it: for we do find, happily for the ends of justice, that men do fall into these inconsistencies, and by means thereof, the fraudulent character of the evidence becomes apparent."

Jotin Hazra, the other approver, it is also urged on behalf of the defence, is, apart from his being an accomplice, an untrustworthy witness. There is certainly little in his general character to commend him for he seems to have been a ne'er-do-weel, and admits to having been a *ganja* smoker. He is a man of indifferent education, and I was not favourably impressed by him in the witness box. We first meet with Jotin in connection with the Morehal dacoity: he was arrested on the 5th February, on the 6th February he confessed, on the 29th of March he retracted: he was tried at the Sessions, and in the end he was acquitted on the 1st April, 1909. Proceedings were then taken against him under section 110 of the Criminal Procedure Code for bad livelihood on the 29th June, 1909, and he was ordered to find sureties on the 17th August. He was not finally released till the 11th February, 1910, as he could not find sureties before. Prior to the 17th of August, however, he had been temporarily released on bail in July, but instead of going to his own house, he went to Kali Babu, a Police Inspector at Uluberia, and told him he would like to



confess. But for a reason which has not been explained, the Inspector instead of taking Jotin Hazra to a Magistrate to have his confession recorded, took him to Inspector Shamsul Alum, and left Jotin with him. Jotin says he told all, and Shamsul wrote it down, but we have not been placed in possession of what was so recorded. On the 15th of February, 1910, he was arrested in this case, and he made a statement to Mr. Forrest on the 17th, two days later.

The defence have drawn attention to the fact that, in reference to the confession in the Morehal case, which was subsequently retracted by him, it was Jotin's contention that he had been tutored to make that confession by Behari Lal, and it is urged that it is significant that he should have made his statement to Mr. Forrest immediately after this same Behari Lal became his surety. Jotin's movements while in custody certainly are deserving of attention. I will start with his being brought to the Presidency Jail, where at the time none of the accused were in custody. He was, however, removed from here to the Alipur Central Jail, where the accused then were. This was a few days before he was required to identify them in the Magistrate's Court, and not only was he removed to the Jail where the accused were, but he seems to have eaten and bathed with them. Almost immediately after he had identified the accused, with whom he was concerned in the Magistrate's Court, he was removed to another Jail. In considering the significance of these moves, it has to be borne in mind that, up to this time, there had been no identification by Jotin. For the defence it is asked, and I think reasonably asked, what is the explanation of all this. None has been vouchsafed, or attempted, and it is difficult to treat the matter as an undersigned coincidence.

This will be a convenient place at which to deal with the confessions.

Reliance has been principally placed on those of the accused Soilen Das and Susil Biswas, and these the prosecution would use not only against the persons making them, but also against the rest of the accused. The warrant for this is to be

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found in section 30 of the Evidence Act, which provides that, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons, is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. The language of the section is guarded, and the history of this Act leaves me in no doubt that this section was designedly framed in these terms. While admissions, a word which embraces confessions, are by section 21 *relevant*, and may be proved as against the person making them, all that section 30 provides is, that the Court *may* take them into consideration, as against other persons. This distinction of language is significant, and it appears to me that its true effect is, that the Court can only treat a confession as lending assurance to other evidence against a co-accused. Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law. This reading of the section appears to me to gain confirmation from the language of section 5.

Further, I think that only can be taken into consideration which is a confession, in the true sense of the term, of the offence for which the persons are then being jointly tried. But, in addition to this, the confessions with which I am now dealing, have been retracted, so that, to place any reliance on them against the co-accused would be most unsafe: *Yasin v. King-Emperor* (1). Counsel for the defence however has gone further, and maintained before us, that there are points on which the confessions are absolutely false, and that these are points on which honest mistake was not possible.

First I will examine Susil's confession. He was arrested on the 7th November, 1909, at Beliasishi for the Haludbari dacoity, and he confessed on the following 14th of December. He speaks to the presence of Lalit Mohan at Belia-

(1) (1901) I. L. R. 28 Calc. 689.

sishi 8 or 9 days before the commission of the Haludbari dacoity, which was on the 28th of October, 1909, and to his taking two swords away with him. He further speaks to having been initiated by Lalit 4 months before his confession. But Lalit's deposition is that he was not near Beliasishi at either of those dates, and according to his story he was not in Beliasishi after May. Further than that, Lalit in the witness box never alluded to this alleged initiation, though he was questioned in his examination-in-chief as to initiations performed by him, and mentioned some, particularly those in which he had taken part. So much for Susil's confession

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I now come to Soilen's confession. To begin with, it is pointed out, that while Soilen in his first confession made on the 29th of October, 1909, the day after his arrest, gave the name of Ganesh Chandra Das alone, saying that he did not know the names of all the rest, in his second confession he names all the Calcutta men and Bidhu. This, it is urged, shows an improvement designed to meet the exigencies of the case. Whether this be so or not is not directly material for the purposes of this case. But what has been most vigorously attacked is the third confession made on the 9th and 10th of March, 1910, after Soilen had been in custody for over four months. In this he purports to give a detailed list of conspirators, even naming 80 men who had not been mentioned by Lalit; he makes repeated reference to Noni Gopal, he gives an account of the Netra dacoity; he implicates some of the accused in the Morehal dacoity, and he deals with a number of other matters. Not only has this confession, as well as the two which preceded it, been retracted by Soilen, but a careful consideration of its contents, and a comparison of them with other materials in the case lead me to regard this statement as eminently untrustworthy, and I am unable to place any reliance on it against Soilen's co-accused. Without attempting a critical examination of the whole of this confession, it will suffice to refer to two matters. Towards the end of this confession, he throws in the remark that, "Noui Babu never keeps any incriminating thing in his

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house." Now this he says on the 10th of March, 1910, while Noni's house had been searched on a previous date, the 20th of January, and nothing incriminating had been found. Then again Soilen almost immediately after this tells us, in the same confession, about the recovery by Noni of cartridges that had been thrown into the tank. It is conceded for the prosecution that this has reference to an incident of which witnesses named Sarna Bewa and Jamini speak. And yet, if Jamini is right in placing the occurrence in Aughran, *i.e.*, November-December, it is difficult to see how Soilen, who was then in custody, could have known of it. This, however, is a matter which I will discuss at greater length when I come to deal with the case against Noni.

For the prosecution it has been suggested that the verification proceedings in this case add a value to the approver's evidence and the confessions, and may be regarded as corroboration. With this I am unable to agree; on the contrary I feel that these proceedings are open to much of the criticism to which they have been subjected. I refrain from noticing in detail this criticism, as in the view I take, it is not necessary for the decision of the case, nor do I propose to discuss at length the comments that have been made on the methods of identification, though I regret that no satisfactory explanation has been given either of Jotin's being moved to and from the Alipur Central Jail where the accused were lodged, a matter to which I have already alluded, or of the under-trial prisoners having been photographed in Jail by the Police, a procedure for which no warrant or justification has been furnished us by counsel for the prosecution. Action of this class, if left unexplained, even after challenge in the clearest terms from the defence, is certainly calculated to occasion some degree of anxiety as to the methods employed in this case.

Considerable reliance is placed by counsel for the prosecution on a series of dacoities committed or attempted, and alleged to be a part of the scheme on which the conspirators embarked. The earliest, according to the prosecution was a

dacoity at the Changripota Railway Station, committed on the 6th December, 1907, and followed by dacoities at Sibpur on the 3rd of April, 1908, at Barah on the 2nd of June, 1908, and at Bighati on the 16th of September, 1908. Then, it is said there was an attempted dacoity at Protapchuck on 14th October, 1908. On the 29th of November, 1908, a dacoity is said to have taken place at Raita, and on the 2nd of December at Morehal. In 1909 dacoities are said to have been committed on the 27th of February at Musapur, on the 23rd of April at Netra, on the 27th of July at Maharajpur, and on the 28th of October at Haludbari.

The incident which has been described as the Changripota dacoity occurred on the 6th of December, 1907; whether or not it was a real dacoity is not clear, but of this I am convinced, that the evidence does not establish the guilt of the accused Narendra Nath Bhattacharjee and Bhusan Chandra Mitter. Shortly after the occurrence, a magisterial inquiry was held, with the result that the accused then before the Court were discharged. This, no doubt, is not binding on this Court, for the discharge was not equivalent to an acquittal. Still the discharge meant that the Magistrate, after taking the evidence, found that there were not sufficient grounds for committing the accused for trial, and he recorded his reasons for that conclusion. No steps were taken at the time to have this order of discharge set aside, and now, more than three years after the event, we are asked to hold that the complicity of the two accused now before the Court has been established. It is not suggested that further evidence has been adduced: on the contrary, some evidence which was adduced before the Magistrate, and which appears to have been favourable to the accused, has not been placed before us. The evidence actually placed before us is open to considerable comment, and this, together with the circumstances to which I have alluded, in my opinion, clearly requires that we should hold the guilt of Noren Bhattacharjee and Bhusan Mitter not proved, and the connection of this dacoity with the alleged conspiracy not established.

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The Sibpur dacoity was on the 3rd of April, 1908, and though Lalit refers to it, his evidence in this connection can command no confidence, and Mr. P. L. Roy wisely refrained from placing any reliance on it.

Nogendro Nath Chatterjee, it is true, was arrested on the 4th or 5th of April, 1908, but no charge-sheet was submitted and he was discharged. Apart from this, there is no evidence that any of the accused took part in the dacoity, or that it was the work of those engaged in the alleged conspiracy.

The Barah dacoity was on the 2nd of June, 1908, and of the accused before the Court, Kartick Dutt was put on his trial for this offence, but was acquitted. There is no credible evidence to connect any other of the accused or the conspiracy with this dacoity. It is true that Lalit tells a tale in connection with the loot of this dacoity that implicate Pabitra Charan Dutt and Bimola Deb, but counsel for the Crown informed the Court that he did not rely on this, and, in my opinion, he had very good reasons for taking this course.

The Bighati dacoity was on the 16th September, 1908, and Kartick Dutt's participation in it is placed beyond question by his conviction. Apart from this there is no evidence of direct participation in the affair by any other of the accused. Lalit's attempt to connect certain of the accused with it by means of conversation he overheard, obviously fails. How far this dacoity can be treated as the work of the conspiracy under investigation will be considered when I come to deal with the case of Kartick Dutt.

The attempted dacoity at Protapchuck is not brought home by reliable evidence, either to any of the accused or to the conspiracy. Though there is reason to think that the Raita dacoity (November 29th, 1908) was committed by what have been termed respectable men, there is nothing which suggests that any of the accused took part in it, beyond the retracted confession of Susil Biswas, who names Manmatha, Ramapodo and Bhupen. But this obviously cannot take the place of legal proof.

The Morehal dacoity was on the 2nd December, 1908, and, as I have already said, Manmatha Nath Rai Chowdhry



has been convicted as one of the offenders. It is said by the prosecution that Dasarathi Chatterji, Shibu Hazra and Atul Pal were also of the party, and the approver Jotin no doubt names them. Not only, however, is his evidence wholly uncorroborated, but it is at least doubtful whether Jotin was at the occurrence. He tells a story of bursting open a safe with gunpowder which cannot have escaped the notice of others, and yet is mentioned by no one; his name does not appear in Manmatha's confession; and though put on his trial he was acquitted at the Sessions. In the circumstances it cannot be fairly said that this dacoity is brought home to any one except Manmatha Nath Rai Chowdhry, though it may be that some of the dacoits were *bhadralog*.

The Musapur dacoity was on the 27th of February, 1909. There is, however, nothing to connect any of the accused with the occurrence. Lalit seeks to connect it with the conspiracy, but his evidence is unreliable. As I have already pointed out he places the dacoity in April, though it occurred in February.

The Netra dacoity was on the 23rd of April, 1909, and it owes its importance in this case to the fact that it was in connection with this affair that the approver Lalit Mohan Chuckerbutty was arrested, and it is on his successive statements that the whole fabric of this case practically rests. He ultimately seeks to implicate no fewer than fifteen of the accused in this dacoity either as actors or instigators. The fact of the dacoity is beyond dispute, and if Lalit is to be believed it was preceded by two abortive attempts. These need not be discussed at any length, nor is it necessary to do more than point out that his evidence as to the second of them is open to considerable doubt, for, while he would place it within the month of April, he states that the attempt failed because the Musapur dacoity interfered, but in fact it appears that the Musapur dacoity was in February.

The first information of the Netra dacoity was lodged by Ram Taran Mitra, the owner of the looted house, within a few hours after the occurrence, and what appears there leaves little doubt that the dacoits cannot have been ordinary cri-

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minals, and it is peculiarly significant that the dacoits were at that early stage reported to have said, "the money and ornaments that we are taking are meant solely for driving the English root and branch from this country. We are in want of funds, and therefore we are obliged to collect money in this fashion. When the time comes we will return the money with interest." This points very clearly to the purpose and personnel of the party, and is in accord with the allegation that the dacoits were Hindus and the sons of *bhadralogs*. Though Lalit in his evidence deposes that the dacoits were 21 in all, yet, in the first information it is said there were only seven or eight young men.

It will be convenient here to recall Lalit's version of the whole affair. After detailing the instructions he received from Noni Gopal Sen Gupta, he states that he went by train to Dewla, where he alighted at 5-40 or 6-40 P.M. with others, whom he conducted to a field. There five men of Joynagar and Mazilpur met them and about midnight, after the last train from Diamond Harbour had passed, the party proceeded to the scene of the dacoity, Ram Taran Mitter's house, led by Lalit. Arrived at the house Kali Chakravarti and Madaru scaled the wall, Lalit concealed himself in a drain, two men mounted guard and the house was looted. Then Lalit led them back again past the field, and, after they had gone 2 or 3 miles, the party sat under a tree and took count of the spoil of which a list was made. With certain trifling exceptions the arms and loot were made over to the men of Joynagar and Mazilpur. The rest went in batches of 3, 4 or 5 up to Sangrampur Mat, the men with Lalit being, to use his own words, "Soilen Das, Bistopodo Chatterjee, Atul Mukherjee and, I think, Upen De." This batch went to Magra Hat Station and there they got into the third train from Diamond Harbour to Calcutta.

Such in broad outline is Lalit's story of the dacoity as presented to us in the course of his examination-in-chief. He then goes on to describe visits to Sarat Mitter and Noni Gopal, his expedition under Noni's instruction on the follow-

ing day, which must have been Sunday, the 25th April, his arrival at Mazilpur, and his return in the early hours of Monday with the plunder, accompanied by Chuni Lal Nandi and Rojoni Bhuttacharjee. Though there is reason to think that this dacoity was connected with some such conspiracy, as is charged in this case, I will reserve for consideration when I come to deal with their individual cases whether the evidence establishes the guilt of Chuni Lal and Rojoni, but against the rest of the accused the imputation that they were in this dacoity fails.

The Maharajpur dacoity was on the 27th July, 1909. The evidence discloses nothing that serves to connect the offence either with any of the accused or with the alleged conspiracy.

The Haludbari dacoity was on the 28th of October, 1909; and the accused Soilen Das, Susil Biswas, Atul Mukerjee, Kiran Rai, Gonesh Das, Sailendra Chatterjee, and Upendra Kristo Deb have on a previous trial been found guilty of this offence. The accused Bidhu Bhusan Biswas and Manmatha Nath Biswas, who were tried with them, were acquitted.

One of the principal overt acts alleged in the complaint initiating these proceedings is, "the seduction of and attempting to seduce certain men of the 10th Jats from their allegiance." This, according to the prosecution, was a distinct and complete offence in itself, and it is much to be regretted that it has not been brought to trial as such. However, this has not been done, and we have therefore been compelled to try, in this case the charge of attempting to seduce the sepoy of the 10th Jats from their allegiance and duty, and of conspiring in such attempt, so that, as far as the present accused are concerned, the judgment of the Court on that charge will be conclusive. The men of the 10th Jats involved in this offence are, according to the prosecution, Surjan Singh, Chunai Havildar, and possibly Ram Gopal; but it is Surjan Singh who figures most prominently in this connection, and the accused whom the prosecution would implicate in this affair are Noren Chatterji, Sarat Mitter, Bhutan Mukerji and Noni Gopal.

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The specific acts alleged are (1) that Surjan Singh was initiated into the secret society at Bhutan's house at Sibpur, where he and Ram Gopal were taken by Noren Chatterjee, (2) that Surjan Singh was thrice given money, once by Noren Chatterji and twice by Lalit, and (3) that these men of the 10th Jats visited Sarat, and were in constant touch with Noren Chatterji. I may say at once that against Noni there is absolutely no evidence; of the payments by Lalit there is not a word of corroboration, and in fact these payments are opposed to Surjan's testimony; for Noren's payment to Surjan we have to depend on the unsupported evidence of Surjan who was, on his own showing a party to this alleged criminal transaction. But there is a more serious difficulty in the prosecution's way. One of the witnesses on whom the prosecution principally rely for the story of the initiation, is Ram Gopal, for his evidence at any rate, it is claimed, cannot be depreciated as that of an accomplice. Ram Gopal was a soldier in the 10th Jats, and his evidence is that he left the regiment in November or December 1908. The exact date must be a matter of record, within easy reach of the prosecution, and no attempt has been made to question the correctness of this date, and so presumably the prosecution accept it as correct. Now, Ram Gopal speaks to the visit with Surjan to Sibpur, and places it 5 or 6 months before he left the regiment, and though it would be wrong to tie him down strictly to this computation of time, it is reasonable to suppose that, according to him, this visit occurred some considerable time before November or December, 1908. Here again the prosecution could have fixed the date, as the excursion is said to have been made while Surjan was in hospital with a dislocated knee. No steps, however, have been taken to show that Ram Gopal was in error, so that here too it is fair to assume that the prosecution accept as correct the time approximately fixed by Ram Gopal. For what it may be worth, I may point out that it was said to be drizzling at the time of this visit to Sibpur, and this would agree with Ram Gopal's estimate of the time. At the same time the evidence of these Jat wit-

nesses is, that before and after the Sibpur incident, they used to go to Sarat's dispensary at 86-1, Diamond Harbour Road. This is clear from the evidence itself, and is confirmed by the fact that it was this house that Surjan Singh pointed out to the verifying Magistrate. The evidence, however, is clear that Sarat was not living in Diamond Harbour Road at the date of this alleged visit to Sibpur, whether it occurred 5 months or even less than 5 months before November-December, 1908. This visit to Sarat's, it has to be borne in mind, is not an irrelevant incident; it is an essential and integral part of the story of the initiation, and the discrepancy, to which I have drawn attention, throws serious discredit on the whole story of the journey to Sibpur, which is in itself improbable. In expressing these definite and positive conclusions in regard to the Jat soldiers, it is right to state that, though they are the conclusions of the Court, they do not in all respects represent our unanimous opinion. But the divergence of view is not such as to qualify the unanimity of our opinion on the essential question whether the accused, alleged to be involved in this incident, are or are not proved to be guilty of the offence of conspiracy with which they are charged. On that we are all agreed.

Then it is claimed that the *Chatra Bhandar* affords strong evidence of the existence of the conspiracy, and is of value as incriminating several of the accused. It came into existence as far back as 1903 as a Students' Co-operative Stores Association, and it is conceded that, in its origin, it was a legitimate trading concern. In August, 1906, it was converted into a limited company, but whether it was before or after this that it was put to unlawful ends has not been formulated by the prosecution. The theory now advanced is, that the conspirators saw in its prosperity a useful instrument for forwarding their ends, and they accordingly captured the Association. The uses to which, according to this theory, the Association was put were, first, to earn money for the conspiracy, secondly, to afford a secure meeting place for the conspirators, and thirdly, to be the Bankers of the cause. But

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ingenious and attractive as this may be as a theory, it has no foundation in established fact; not one of these three suggestions is proved. But then it is said that a close connection existed between the *Chatra Bhandar* and the *Jugantar*, and that, from this the true character of the *Chatra Bhandar*, is to be learnt. For this, reliance is placed on the fact that the proof of the *Chatra Bhandar's* blue prospectus was printed at the Sumati Printing Works. But it would seem that these printing works belonged to Nikhileshwar Roy Moulick, who was a Director of the *Chatra Bhandar*, so that the fact on which so much reliance is placed, is capable of an explanation which is not only innocent but probable. And, in this connection, it has to be borne in mind that Nikhileshwar has been conclusively acquitted of participation in the conspiracy set up by the prosecution. It is true that on the *Chatra Bhandar* prospectus the *Jugantar* was advertised, but of this an explanation has been suggested, and, in any case, it cannot be overlooked that the *Chatra Bhandar* had 10 Directors, and that, of these, two have been acquitted of being concerned in the conspiracy, while, of the remainder, it is only against Pabitra that any suggestion of complicity has been made. Moreover, at this time, it has to be remembered, the *Jugantar* had been in existence some considerable time, its popularity was great, and no objection had been taken to its tone and its teaching by the authorities. Precisely the same considerations apply to the alleged connection with the *Mukti Kon Pathe*. Then again, so far as the printing of *Chatra Bhandar* documents is concerned, it was in no sense limited to the Sadhana Press, but the accounts show that a large amount of printing work was done at other presses, even while the Sadhana Press was in existence.

Then it is urged that the *Chatra Bhandar* is condemned by the books it sold. True, it is, that *Mukti Kon Pathe*, *Bar-taman Rana Niti*, and *Jaatiya Samasya* were sold there, but they were not proscribed books: they were sold elsewhere, and it is not suggested that they were only sold at establishments in league with the conspiracy. Nor were the *Chatra*



*Bhandar's* sales of books restricted to these three publications: on the contrary, it is clearly shown that a large number of different publications was sold to which no exception could be taken. There has been some discussion before us as to whether the three offending publications, to which I have referred, belonged to the *Chatra Bhandar*, or were merely sold by it in the ordinary course of business, and each side has referred us to the Association's books of account. But such of them as have been produced throw no conclusive light on the point, and as possession of all was taken by the police, the defence cannot be treated as responsible for the non-production of the rest, so all that can be said is that the prosecution have not proved that these publications belonged to the *Chatra Bhandar*. I do not overlook the expressions and sentiments contained in the blue prospectus to which our attention has been drawn, but giving to them all the force adverse to the Association to which they are fairly entitled, I find it impossible to regard them as establishing the *Chatra Bhandar's* connection with the conspiracy into which we are inquiring in this case.

It is the case for the prosecution that the *Jugantar* was an integral part of the conspiracy. It was started in March, 1906, and its origin and its purpose are matters of common knowledge. Its articles and its popularity have been brought to our notice, and the facts show that those who guided its policy managed to select writers possessed of a style so levelled to the popular taste that, even street traffic was impeded in the rush of would-be purchasers. Inspector Purno Chunder Lahiri has told us that people were amazed at the inaction of the Government, and the audacity of the paper, and this I can well understand, for notwithstanding its pernicious teachings no step was taken to check it until July, 1907. All this may be conceded and regretted, but our concern is to see how far the connection of the *Jugantar* with the conspiracy we are investigating, and the accused we are trying, has been made good. Taranath's connection with the *Jugantar* is established, but he holds an isolated position among these ac-

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cused, as does Kartic, who, alone of the rest, is said to have had relations with that paper. Apart from this the accused are not shown to have been connected with the *Jugantar* in any sense that would justify us in holding that it was a limb of the conspiracy under trial. The mere discovery of copies of the paper at searches proves nothing, for admittedly, it had an unusually wide circulation. True it is that the *Jugantar* was a limb of the Muraripukur Garden conspiracy, but as I will show, that was distinct from the one which we are enquiring. And this brings me to the prosecution's suggestion that the conspiracy with which we are concerned in this case is a part or branch of that which had its head-quarters at Muraripukur Garden. This was not the case for the prosecution as formulated in the complaint of the 4th of March, 1910, on which these present proceedings were initiated: there is no mention there of that conspiracy, and not even a reference to any of the overt acts which were a part of that conspiracy. And yet this can hardly have been due to oversight, for that conspiracy and the outrages that belonged to it were a matter of public notoriety.

It was not until the 25th of May, 1910, that a reference was made to the Muraripukur conspiracy, or to the accused Taranath and Kartic, who are said to have been intimately connected with it. Now it is well known that the Muraripukur conspiracy was the subject of long and careful police investigation, and of subsequent judicial inquiry and trial, in the course of which a very large number of witnesses and an immense volume of documentary evidence was used. No pains were spared to secure an exhaustive inquiry, and yet it is not suggested before us that anything came to light that would establish the connection now sought; and it is remarkable that counsel for the prosecution has been unable to suggest that, in any of the mass of documents seized at the Muraripukur Garden, there is any trace of the connection now alleged. The suggestion made in counsel's opening speech that this conspiracy was linked with the Muraripukur Garden conspiracy, through an alleged connection between Kartic Dutt and Hem

Das, has absolutely not a tittle of evidence in its support. And the proposal to connect this conspiracy with the Muraripukur through Sirish Sarkar and Satis Sarkar, and the expedition from Patna to Nepal, is far too fanciful and remote for serious acceptance.

Much evidence has been adduced to show association in music, gymnastic exercises and *lathi* play, and it is on this *lathi* play that the prosecution have principally relied. But when counsel was asked to formulate the part played by these *lathi* exercises in the scheme of the conspiracy, he was unable to advance any suggestion from which much assistance could be derived. It may be that these exercises would conduce to the acquisition of strength, agility, hardihood and discipline, all no doubt qualities useful in war, but it was not and could not be reasonably argued that the contemplated war was to be waged with *lathis*, or that these exercises standing alone could be treated as evidence of a conspiracy to wage war. To attach sinister significance to the mere association in play or pastimes of those who live in the same village or attend the same school, would, I think, be dangerous at any rate on the evidence that has been adduced before us. Evidently it did not occur to those who joined in these exercises that they were doing that which would bring them into their present predicament, for there was a complete absence of secrecy, and rather a courting of publicity in the performance of these exercises. The defence are not without a theory as to the significance of this *lathi* play, but in the view I take, it is unnecessary to discuss it.

There is but one further point to which I would desire to allude before I proceed to deal with the individual cases. It is the charge of conspiracy that has been argued before us, and no other, and that charge is single and complete. At the same time there are many accused before us and they are drawn from different parts of the country. These accused have been described by the prosecution, and conveniently described, as falling into groups. But it is not open to us to find more conspiracies than one, for there is the highest autho-

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rity that it is a legal impossibility when several persons are charged with the same conspiracy that some should be found guilty of one conspiracy and some of another. This proposition was accepted by counsel for the prosecution as one by which the Court must be governed. It is thus only open to us to find one conspiracy, and for the prosecution to succeed against any one of the accused, they must establish by proper and sufficient proof that he is a member of that conspiracy.

Any accused not shown to be a member of that conspiracy is entitled to demand an acquittal at our hands, however bad his record may be and however much he may be suspected of this or that offence. Any other view would be intolerable.

[ His Lordship then dealt with the individual case of each of the accused, and proceeded as follows:—]

This then ends the case against all the accused, and the result is we all hold the charge under section 121A, of the Penal Code, established against Soilen Das, Sushil Biswas, Atul Mukherjee, Gonesh Das, Soilendra Nath Chatterjee and Upendra Kristo Deb.

The rest of the accused must, in our opinion, be acquitted of the charges against them, and, with the exception of those at present serving sentences that have been inflicted on them, they must be set at liberty as the law directs.

It only remains to consider what sentences should be passed on those whom the Court holds guilty of the offence with which they stand charged. The sentence that they have merited is in our opinion eight years' transportation from this date, and that is the sentence we would have passed, but for the fact that they are already undergoing sentences as the result of their conviction in the Haludbari case; we must have regard to these sentences and to the somewhat inconvenient provisions of sections 397 and 398 of the Criminal Procedure Code, and this accounts for the form in which our sentence is framed.

The Court sentences Soilen Das and Sushil Biswas to two years' rigorous imprisonment, and directs that the sentence on

each shall commence at the expiration of the imprisonment to which he has been previously sentenced in the Haludbari case, and the Court sentences Atul Mukerji, Gonesh Das, Soilendra Nath Chatterjee and Upendra Kristo Deb to one year's rigorous imprisonment, and directs that the sentence on each shall commence at the expiration of the imprisonment to which he has been previously sentenced in the Haludbari case.

I would only add my appreciation of the admirable temper with which this long and anxious case has been conducted on both sides, and my acknowledgment of the assistance we have received.

BRETT AND CHATTERJEE JJ. concurred.

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## PRIVY COUNCIL.

PURNA SHASHI BHATTACHARJI

v.

KALIDHAN RAI CHOWDHURI.

P.C.\*  
 1911  
 Feb. 27,  
 May 4.

[On appeal from the High Court at Fort William in Bengal.]

*Hindu Law—Inheritance—Document attempting to alter the mode of Succession—Scheme of Devolution contrary to Hindu Law—Instrument laying down rules to secure succession in direct male line for an indefinite period, and without gift to any person—Succession on failure of direct male issue—Exclusion of female heirs—Dayabhaga Law.*

Two brothers K and N, subject to the Dayabhaga School of Hindu Law, executed, on 28th March, 1866, a document whereby after reciting that "whereas body is mortal it is impossible to say what may befall at what time, and as ruin may ensue from disputes relating to the shares arising in future among son, daughter, daughter's son and childless widow unless some rules are regularly framed, and it has accordingly become necessary to prescribe a set of rules in that behalf, and hence the rules mentioned below are laid down: these shall become operative and come into force on our death," they purported to provide for the permanent devolution of their respective properties in the

\* Present: LORD MACNAGHTEN, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.



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direct male line, including adopted sons, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule, and only in the absence of male descendants in the direct line in either branch were the properties to go to female heirs and their descendants. *K* died in 1868 leaving a son *A*, a daughter *D*, his brother *N* and their mother *C*. *A* died in 1872 without any issue, and *C* in March 1901. The plaintiffs (appellants), who were the sons of *D*, instituted this suit on 29th July, 1901, against *N*, claiming, as next reversioners to *A* their maternal uncle, the properties which originally belonged to *K* and which had since come into the possession of *N* the defendant. *N* died shortly after the suit was brought, his sons (the respondents) being substituted for him on the record. Their contention was that under the instrument of 1866 the properties in dispute passed on the death of *A* to *N* and on his death to them. The High Court (reversing the decision of the Subordinate Judge) was of opinion that in the circumstances that had actually happened, *A* under the document of 1866 had, in the properties in suit, an absolute estate defeasible in case of death without male issue, and as he died without male issue the heirs of *K* (the respondents) would succeed.

*Held* (reversing that decision), that the clear intention of the instrument of 1866 was to vary the rules of Hindu Law and to control the devolution of the properties until the indefinite failure at some remote period of the male line of *K* and *N*; and that such an attempt to alter the mode of succession was, on the principles laid down in the case of *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1), illegal and void. Throughout the instrument there was no indication of an intention to make a gift to any person: and there was no warrant for the contention that there was a devise in favour of *A* with a gift over to *N* his uncle. The question was not whether the gift over was good in the event which happened, but whether it was good in its creation.

APPEAL from a judgment and decree (14th March, 1906), of the High Court at Calcutta, which reversed a judgment and decree (16th April, 1903), of the Court of the Subordinate Judge of Tipperah.

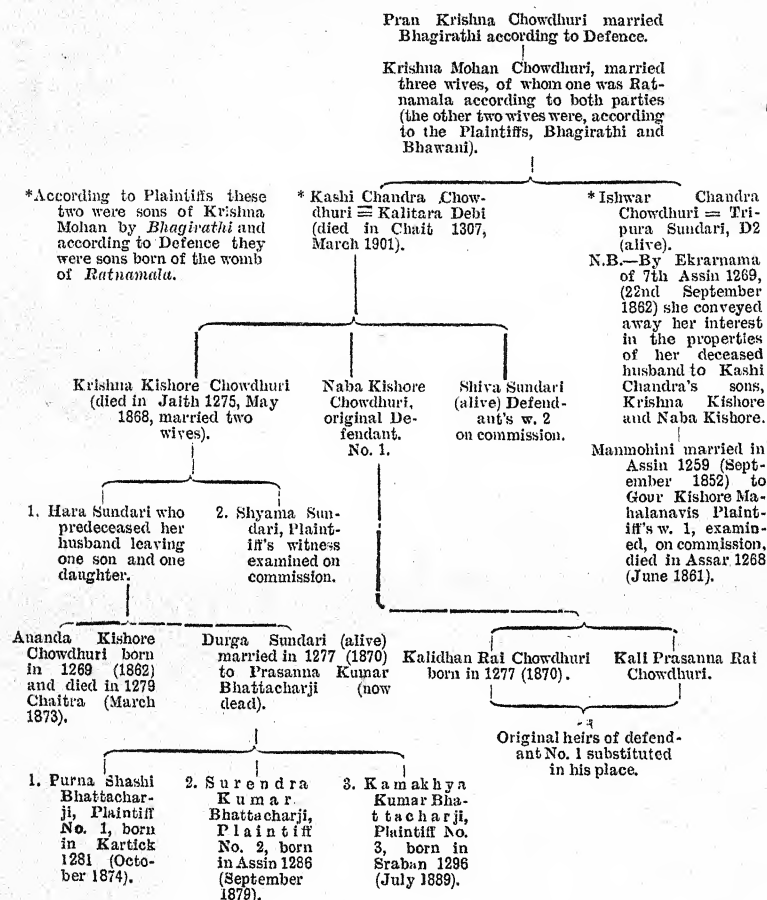
The plaintiffs were the appellants to His Majesty in Council.

The suit was brought on 29th July, 1901, for a declaration that the plaintiffs were entitled by right of inheritance to a half share of certain properties moveable and immoveable specified in the plaint, for possession, for an account and other relief.

(1) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.



The relationship of the parties concerned in the suit is explained by the following pedigree :—



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The pedigree showed that the plaintiffs were the sons of Durga Sundari, the sister of Ananda Kishore Chowdhuri, the son of Krishna Kishore Chowdhuri, and that the original defendants were Naba Kishore Chowdhuri, and Tripura Sundari the widow of Ishwar Chandra Chowdhuri, who was the brother of Kashi Chandra Chowdhuri, the father of Krishna Kishore Chowdhuri and Naba Krishna Chowdhuri. In favour of the two last mentioned members of the family Tripura Sundari, on 22nd September, 1862, executed an ekrarnama,

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by which for the considerations mentioned therein, she made over to them a half share of the joint estate held by her as the heir of her husband. On the 28th March, 1866, Krishna Kishore Chowdhuri and Naba Kishore Chowdhuri executed a document described as a will in which they laid down certain rules in regard to the devolution of their joint estate, and it was the construction of this document which formed the main question for determination in the present appeal. Krishna Kishore Chowdhuri died in 1868 leaving an only son, the said Ananda Kishore Chowdhuri as his heir, a daughter, the said Durga Sundari by a wife who had predeceased him, his mother Kalitara Debya, and a widow named Shyama Sundari. On his death a half share of the joint estate devolved upon his son Ananda Kishore Chowdhuri, who, however, died without leaving male issue, in 1872, and his share of the estate devolved upon his grandmother the said Kalitara Debya. She died in March, 1901, and the plaintiffs claiming as reversionary heirs of Ananda Kishore, their mother's brother, thereupon instituted the suit out of which the present appeal arose. The claim included not only a moiety of the properties which were held jointly by Krishna Kishore Chowdhuri and Naba Kishore Chowdhuri, but also a moiety of the properties acquired since the death of Krishna Kishore Chowdhuri, as also a moiety of those acquired since the death of Ananda Kishore Chowdhuri.

Naba Kishore Chowdhuri died soon after the institution of the suit, and his sons Kalidhan Rai Chowdhuri and Kali Prasanna Rai Chowdhuri as his heirs were substituted as defendants on the record.

The defence mainly related to the title claimed by the plaintiffs. It was pleaded (*inter alia*) that Ananda Kishore Chowdhuri having died without leaving any male issue, the share of the estate which belonged to Krishna Kishore Chowdhuri and which devolved upon Ananda Kishore Chowdhuri, came, under the terms of the will dated 28th March, 1866, into the possession of Naba Kishore Chowdhuri, and the plaintiffs could not claim it as sons of Ananda Kishore Chowdhuri's

sister; and that under the will there was a gift over in favour of Naba Kishore Chowdhuri and his male descendants.

In the first Court it was admitted that if, the document of 28th March, 1866, was no bar to their claim, the plaintiffs were entitled to the shares of the ancestral and joint family properties claimed in the plaint. It was on the construction of that document, therefore, that the plaintiffs' title depended, and that was the main question for decision in the suit.

The terms of the will so far as they are material for this report, are sufficiently set out in the judgment of the High Court, and in the judgment of their Lordships of the Judicial Committee.

On the construction of the document the Subordinate Judge was of opinion "that the will set up by the defendants is genuine, but it has no legal effect as far as the bequest in favour of the deceased defendant, Naba Kishore Chowdhuri, or his son or grandson, etc., is concerned, and it is no bar to the plaintiffs' claim as heirs according to the Hindu law of inheritance. . . . It is also held that the testator by his will meant to make a bequest in favour of his brother or any male descendant in the male line of his brother, however remote, upon the extinction of his own male line at any time and after any number of generations. The question is not whether the gift over was good in the event which happened afterwards, but whether it was good in its creation. A gift over on an indefinite failure of male issue is illegal."

The Subordinate Judge made a decree in favour of the plaintiffs.

An appeal by the defendants to the High Court was heard by CHUNDER MADHUB GHOSE and PARGITER JJ., who reversed the decree of the Subordinate Judge and dismissed the suit.

The material portion of their judgment was as follows:—

"The main question, however, upon which the parties were really in contest was as regards the construction of the will executed by Krishna Kishore and Naba Kishore, namely, whether under the terms of that document the plaintiffs could succeed. There was another question raised between the parties as to the validity and effect of the ekrarnama executed by Tripura Sundari, and as to who should in the event of the death of that lady succeed to the moiety share of the

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estate, which was assigned over to Krishna Kishore and Naba Kishore under the ekrarnama in question. As regards this last mentioned matter there can be no question that as a matter of fact under that document a moiety of the estate was assigned over to Krishna Kishore and Naba Kishore, and the Subordinate Judge was of opinion that the document was so far valid, and that Tripura Sundari being alive, and she being entitled to a life-estate, the plaintiffs were entitled to a moiety share of that estate, and that the question of who would, in the event of her death, succeed to her share of the estate did not arise. But notwithstanding this he expressed the opinion that the reversionary heirs of Ishwar Chandra would, upon that event happening, be entitled to come in notwithstanding the said ekrarnama. Tripura Sundari, we might here mention, has, since the appeal was preferred to this Court, died, but it seems to us that the rights of the parties must be regulated by the facts as they stood upon the date of the decree of the Court below and we need not discuss in this appeal the question on whom the property has now lawfully devolved.

"As already mentioned the principal matter upon which the parties were in contest in the Court below was as to the construction to be put upon the will executed by Krishna Kishore and Naba Kishore. The Court below has held that under the law there could be no valid gift over because of the uncertainty and remoteness of the time when such gift over was to take effect and further that the gift over was otherwise invalid in law and that the heirs-at-law could not be excluded from their legal rights of inheritance without a valid devise to some other person. This view has been hotly contested before us in this appeal on behalf of the defendants appellants, and we proceed to discuss the matter.

"The will begins by saying that as it is impossible to say what may befall at what time and as ruin may ensue from disputes relating to the shares arising in future amongst son, daughter, daughter's son and childless widow, unless a set of rules is laid down, it is necessary to prescribe such rules.

"In the first paragraph it declares that all the moveable and immoveable properties, ancestral and self-acquired, of the testators shall belong to them, their sons, grandsons and other heirs in equal shares and that they shall get the same in the manner stated hereafter.

"In paragraph (2) it says 'Of either of us two if one or his son being alive, the second one himself or (his) son be non-existent, the said surviving person or his son shall get all the moveable and immoveable properties left by the deceased with rights of ownership. A sonless widow or daughter or daughter's son shall have no sort of *adhikar* (possession) or title in any the least manner to that property, but shall only get during their lifetime food and clothing, etc., as is provided in the 5th paragraph.'

"In the next paragraph (3) it says, that their sons and grandsons shall be able to deal with the properties left by them in any way they wished in their rights as full owners.

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"In paragraph (4) it says 'If there be no progeny, that is, a son and grandson, etc., in existence of either of us two, which may God forbid, then the widows or daughters or sons born of their (daughters') womb and in their default, father's daughter's son, etc., of us both shall get only such of their own respective shares as they may get according to the Shastras, no claim on the part of any shall prevail on the ground of some one having had become the owner of the property of another under the provisions of this will. The widows and daughters and sons born of the womb of daughters, etc., of us both whoever may be alive shall be owners (*adhikari*) according to the Shastras.'

"Then in the 5th paragraph it is stated 'On the death of one of us during the lifetime of the other one or of his male issue, his sonless widow, as long as she lives, shall, by residing in the same mess with the said surviving person, get food and raiments and the expenses of *sradhs* and pilgrimages, etc.' And later on in the same paragraph, 'And if the said deceased should have no son, but have daughters, then the said surviving person and his sons at their own expense shall give the said daughter or daughters in marriage, etc.'

"Then in the 6th paragraph the will says 'if on the death of one of us the other be alive and the son of the said deceased be a minor then, until he comes of age the said minor son and his moveable and immoveable properties shall remain under the guardianship and management as *karta* of the said surviving person and the properties shall not go under the care as *asi*, and management as *karta* of anybody else, etc.'

"In the 7th paragraph provision is made for the widow of either of them in the event of her having no son born of her womb, and it concludes as follows:—'Under the terms of this writing the wives of our sons, grandsons, etc., will not be entitled to make any claim. If they do, it shall be rejected. Nobody shall be competent to make any deviation from this.'

"In the 8th paragraph the following words occur:—'The word *putra* (son) shall mean son, son's son, son's son's son, and adopted son and his son, etc., being male issues, and the words written in this will are to be taken in their plain sense and not in any distorted (far-fetched) sense.'

"Then in the 9th or the concluding paragraph it is stated:—'The rule that we two uterine brothers prescribe by this will as between ourselves shall continue to prevail and be operative from generation to generation (literally, down to our sons, grandsons, etc., successively). If any one having the power under this will should make correction or alteration in a proper and just manner by a special document in writing, then with the exception of paragraph (4) the other paragraphs may be corrected or altered, etc.'

"We have now sketched out the principal provisions of the will. The argument that has been advanced before us has been directed principally to paragraphs (2), (3), (4) and (5) and the last portion of paragraph (7); the contention of the defendants being that upon the

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event of either of the two persons or any of their male descendants leaving no son, grandson, and great grandson, his share of the estate is to go over to the surviving person or his son, grandson, etc., as the case may be as owner; that a sonless widow or daughter or daughter's son shall not succeed except only in the event mentioned in paragraph (4); that though under paragraph (3) Ananda Kishore obtained an absolute estate of inheritance, yet it was defeasible on the failure of male issue; that he having died without any male issue the estate would revert to the legal heirs of Krishna Kishore, that is to say, to Shyama Sundari the widow of that individual even if the gift over was bad, and that the plaintiffs in these events are not entitled to succeed. The contention on the other side, shortly stated, is that there was no valid gift over, that the estate having devolved upon Ananda Kishore as full owner under paragraph (3) nothing in the other parts of the will could nullify or qualify such full ownership and that upon the death of Ananda Kishore his estate would go to his heirs according to the ordinary Hindu Law of inheritance.

"We should here mention that at the date of the will in question Ananda Kishore, the son of Krishna Kishore, had been born while Naba Kishore had no son then born to him.

"Applying ourselves in the first place to what the true intention of the testators was, it seems to us that their intention was to exclude female heirs and heirs claiming through females and to keep the succession to male heirs only. Following this intention and with a view to carry it out, it is provided in paragraph (4) of the will, that it is only in the event of neither of the two testators leaving male issue, the widows or daughters or daughters' sons would succeed. It is, however, extremely doubtful whether in the event of any of the male descendants of the testator dying without male issue, there was a valid gift over to Naba Kishore or any of his male descendants, by reason of uncertainty and remoteness of time when such gift over was to operate, though no doubt it may be said that Ananda Kishore being then in existence the gift over might take effect immediately at the close of his life and in favour of Naba Kishore. It is, however, not necessary to express any decisive opinion upon this matter in view of the opinion that we have formed upon the question of the true character of the estate which Ananda Kishore took under the will and which we shall presently express.

"Turning then to the questions what might be the exact estate which Ananda Kishore obtained upon the death of Krishna Kishore, and to whom the estate devolving upon him would go upon his death without any male issue, it seems to us that if we could confine our attention simply to paragraphs (1) and (3) of the will we should have to hold that Ananda Kishore obtained an absolute estate of inheritance and that even if he died without male issue, as he did in this case, his legal heirs, whether male or female, would succeed. But reading those paragraphs with paragraphs (2), (4) and (8), as they must be so read in order to ascertain what the true intention of the testators was, we



think that though he obtained an absolute estate, yet such estate was defeasible in case of his death without male issue, with a provision in that event for his widow and daughter. No doubt under paragraph (7) of the document, the wives are only excluded but that is not the only paragraph which we have to deal with. It is indeed true that paragraphs 2 and 4 refer in terms to widows, daughters, sons of daughters, father's daughter's sons, etc., and may not, strictly speaking, be applicable to sisters' sons and so forth; but still taking the whole scope of the will, it is quite clear that the intention was to exclude female heirs and persons claiming through such heirs and it will be observed that the plaintiffs in this case are the daughter's sons of Krishna Kishore as indicated in paragraph (2). It has, however, been contended that such portions of the will which exclude female heirs and persons claiming through such heirs, should be held to be inoperative as being repugnant to paragraphs (1) and (3) which purport to give to the sons and grandsons of each of the two testators an absolute estate. But if we were to do so, it would be, as was held by the Privy Council in the case of *Tarokessur Roy v. Soshi Shikhuressur Roy* (1), altering the words prescribing the course of succession so as to admit females, and would be in effect making a new will for the testators, and one which so far from carrying their intention into effect would be in direct opposition to their intention as expressed in other parts of the will, namely, to exclude females and heirs claiming through females.

"It has, however, been contended that Ananda Kishore having, during his lifetime, an absolute estate, if he had disposed of the whole or any portion of it such disposition could not be defeated if he died without any male issue. The answer to this argument is that, as a matter of fact, he did not make such disposition and the estate remained with him up to the time of his death. And the question is, what was the character of the estate, or the interest therein, that he had acquired or left behind him? We desire here to refer to the case of *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhury* (2), decided by the Judicial Committee, and to the remarks of that Committee in the case of *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (3), as also to the observations of Sir Barnes Peacock in the case of *Bissonauth Chunder v. Bama Soondery Dossee* (4), observations which were not dissented from by the Privy Council; as well as to the case of *Raikishari Dasi v. Debendranath Sircar* (5). And, following the principle underlying these cases, we are of opinion, as already indicated, that the absolute estate which Ananda Kishore obtained was defeasible in the event of his death without male issue. It may, no doubt, be said that there was no gift in this case by Krishna Kishore and Naba Kishore in favour of any of their descendants, and that the document merely declares their

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| (1) (1883) I. L. R. 9 Calc. 952;<br>L. R. 10 I. A. 51. | (3) (1897) I. L. R. 24 Calc. 834,<br>850, 851; L.R. 24 I.A. 76, 90.                         |
| (2) (1878) I. L. R. 4 Calc. 23;<br>L. R. 5 I. A. 138.  | (4) (1867) 12 Moo. I. A. 41, 48.<br>(5) (1887) I. L. R. 15 Calc. 409;<br>L. R. 15 I. A. 37. |

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rights in future, and that such rights must therefore be regulated by the ordinary Hindu law. But it will be observed that so far as Krishna Kishore was concerned, his son Ananda Kishore was then born and it may well be taken that he had before his mind that individual at least; and hence the bequest should be taken to be in favour of Ananda Kishore and such other sons as might be born to him thereafter and their male descendants. We are concerned in this case with Ananda Kishore alone and the estate left by him; and so far as he was concerned, as already indicated, it may be taken that there was a valid gift in his favour subject to the limitations prescribed.

"It has, however, been contended before us that the document was no will at all but merely a declaration of the respective rights of the two parties and their future descendants. This is, no doubt, a view which may well be put, but after the best consideration we have been able to give to it, we have come to the conclusion that it was to all intents and purposes a will. It may at any rate be taken to be a family arrangement; and if so, the rights of the parties and their descendants have to be regulated by the provisions made therein, supposing such provisions do not infringe any rule of law.

"If then Ananda Kishore took an estate of the character we have described, it follows that in the event which happened on the death of that individual, the estate reverts to the heirs of the testator Krishna Kishore and in this view we are supported by the decision of the Madras High Court in the case of *Manjama v. Padmanabhayya* (1).

"It has however been contended that if the gift over fails, the estate must descend to the legal heirs of Ananda Kishore; but it will be observed that the provisions of the will as regards the exclusion of female heirs and persons claiming through such heirs and as to the true character of the estate which a son, grandson or great grandson would receive, are separable and not inseparable from the provisions as regards the gift over contemplated therein in the event of any one of those heirs dying without male issue. If this is so, it follows that though the gift over may be held to be bad, the estate upon the death of Ananda Kishore would revert to the legal heirs of Krishna Kishore.

"We have already mentioned that Krishna Kishore left a widow Shyama Sundari who is still alive and she would succeed in preference to Krishna Kishore's daughter's sons, the present plaintiffs. Such being the case we are unable to hold that the plaintiffs are entitled to succeed in this case.

"It has, however, been said that the question whether Ananda Kishore took an estate which was defeasible in the event of his dying without male issue and that it would revert to the legal heirs of Krishna Kishore, was not raised in the Court below. It is, however, difficult to say looking at the judgment of the Subordinate Judge that this precise point was not raised. But whether it was raised or not it is a question of law and it arises upon the construction of the will itself and there is no dispute as to the facts. And

(1) (1889) I. L. R. 12 Mad. 393.

the true question that we have to determine is whether the plaintiffs can claim this estate as heirs of Ananda Kishore. We are of opinion, for the reasons already given, that they cannot."

On this appeal,

*DeGruyther, K.C.*, and *Ross*, for the appellants, contended that a wrong construction had been put on the document of 28th March, 1866, which had been treated by the High Court as a legal and valid instrument. But the intention in the execution of the so-called will was clearly to prevent female heirs, or males descended through female heirs from inheritance, and to vest the right of inheritance for ever in the direct male issue of the two executants. That intention was evident from the preamble of the document and from the written statement of the defendant Naba Kishore Chowdhuri where he said that it was agreed between him and Krishna Kishore Chowdhuri "that some measures ought to be adopted in order that females and daughters' sons in our family may not, by becoming entitled to inheritance, put us to trouble"; and that it was therefore provided by the document they executed that, "if during the lifetime of either of us or of his son, the other one and his son should die, then all the properties left by that other shall become vested in the said survivor or his son; neither the widow nor the daughter nor the daughter's son of the deceased shall by any means become entitled as owner to the properties left by him." At that time Ananda Kishore was born, but no son had been born to the defendant Naba Kishore Chowdhuri. And the scheme was an alteration of the rules of the Hindu Law. A bequest on an indefinite failure of male issue was void under the well-known principles laid down in the case of *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1). If, as there stated, a man cannot carry out his intention in a way other than in accordance with the rules of Hindu law, it follows that, if he does so, his intention as expressed in a document ought not to be carried out; in other words the document would be invalid and void. Here the document was not intended

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to be a will, or to make a gift to anyone, but merely to lay down rules, contrary to Hindu law, for the succession for an indefinite time of certain persons who might never come into existence. This being clearly void, there was nothing in the document of 28th March, 1866, to bar the appellants' claim. Reference was made to *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (1). The High Court had erred in holding that the properties in dispute passed, on the death of Ananda Kishore Chowdhuri, not to his heirs, but to the heirs of Krishna Kishore Chowdhuri; and also in not holding that Krishna Kishore Chowdhuri took an absolute estate under the ekrarnama of 1862 executed by Tripura Sundari.

*Buckmaster, K.C.*, and *J. M. Parikh*, for the respondents, contended that the document of 28th March, 1866, was, and was intended to be, a will, and was meant to come into operation on the death of Krishna Kishore Chowdhuri. The document did not contain mere rules to become operative in case of an intestacy. The motive for making it was immaterial. The 1st paragraph of the document showed it to be a will: the 2nd and 3rd paragraphs were important, and did not seem to be intended to come into operation only at an indefinite time. The evidence as to the execution of the instrument also showed it to have been meant to be a will. Reference was made to *Lalit Mohan Singh v. Chukkun Lal Roy* (2). Under the will Ananda Kishore Chowdhuri took on the death of Krishna Kishore an absolute estate, defeasible in the event of his (Ananda Kishore's) death without leaving male issue; and in the event that happened, on the death of Ananda Kishore without male issue, the estate, it was submitted, went to Naba Kishore absolutely, or in the alternative to Shyama Sundari, the testator's widow and heir who was still alive. Even if the will were inoperative, and the property, on the death of Ananda Kishore, passed to his heir, Naba Kishore was at that time the only person capable of inheriting it, Kalitara having renounced the world before Ananda Kishore's death, and none of the appellants

(1) (1878) I. L. R. 4 Cal. 23;  
L. R. 5 I. A. 138.

(2) (1897) I. L. R. 24 Cal. 834;  
L. R. 24 I. A. 76.

being then in existence. The decision of the High Court should be upheld. The respondents were not liable to account.

*DeGruyther, K.C.*, in reply, referred to paragraph 8 of the document which put a meaning on the word "putra" which, he contended, might be construed as settling the succession in favour of the male issue of the executants for an absolutely indefinite time, in fact for ever. If not so construed it meant nothing. The appellants were entitled to an account.

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The judgment of their Lordships was delivered by

MR. AMEER ALI. This is an appeal from a judgment of the High Court of Bengal, dated the 14th of March, 1906, reversing a decision of the Subordinate Judge of Tipperah; and the only point for determination turns upon the construction of a document executed in 1866 by two brothers, Krishna Kishore Chowdhuri and Naba Kishore Chowdhuri, subject to the Dayabhaga School of the Hindu Law, by which they purported to provide for the permanent devolution of their respective properties in the direct male line, including adopted sons, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule; and only in the absence of male descendants in the direct line in either branch were the properties to go to female heirs or their descendants.

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Krishna Kishore died in June 1868, leaving him surviving, besides a son named Ananda Kishore and a daughter Durga Sundari, his brother Naba Kishore and their mother Kalitara. Ananda died in 1872 without any issue and Kalitara in March 1901.

The plaintiffs, who are the sons of Durga Sundari, instituted this suit on the 29th of July, 1901, against Naba Kishore, claiming as next reversioners to Ananda, their material uncle, the properties which originally belonged to Krishna Kishore and after him to Ananda, and which had since come into the possession of the defendant (Naba Kishore).

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Naba died shortly after the institution of the suit, and his sons, the present respondents, were then brought on the record in his place as his legal heirs and representatives.

The plaintiffs' case is that, notwithstanding the rules laid down by the two brothers in the instrument of 1866, which they contend to be invalid under the Hindu Law, on the death of Ananda Kishore the properties descended to his grandmother Kalitara, who held them as a life-tenant until her death, and that on her decease Ananda Kishore's estate devolved on them as his next reversioners.

The defendants' contention is that under the instrument of 1866, on the death of Ananda Kishore, the properties forming the subject-matter of the present litigation passed to Naba, and on his death to the respondents in this appeal.

It appears that in 1862 one Tripura Sundari, the widow of Ishwar Chandra, paternal uncle of Krishna and Naba, conveyed to them jointly her interest in the properties belonging to her deceased husband; the plaintiffs claim to recover in this suit the share of Krishna in these properties also. Tripura, who was joined as defendant to the action, died after the trial in the First Court.

With regard to the main issue in the case, viz., the construction of the instrument of 1866, the Subordinate Judge held in substance that the provisions therein contained regulating the perpetual descent of the properties of the two brothers in the lineal male line were in contravention of the rules of Hindu Law, and were, consequently, invalid; and that the plaintiffs were entitled to recover the properties in suit, save certain items regarding which there is no question in this appeal. He accordingly made a decree in favour of the plaintiffs, but disallowed their claim for account against the respondents.

The High Court on appeal came to a different conclusion. It considered that, under the circumstances that had actually happened, Ananda Kishore had obtained under the instrument in question an absolute estate defeasible in case of death without male issue.



The real gist of the judgment is contained in the following passages:—

“Turning then to the questions what might be the exact estate which Ananda Kishore obtained upon the death of Krishna Kishore, and to whom the estate devolving upon him would go upon his death without any male issue, it seems to us that if we could confine our attention simply to paragraphs (1) and (3) of the will we should have to hold that Ananda Kishore obtained an absolute estate of inheritance, and that even if he died without male issue, as he did in this case, his legal heirs, whether male or female, would succeed. But reading those paragraphs with paragraphs (2), (4), and (8), as they must be so read in order to ascertain what the true intention of the testators was, we think that though he obtained an absolute estate, yet such estate was defeasible in case of his death without male issue, with a provision in that event for his widow and daughter.”

And again:—

“It may no doubt be said that there was no gift in this case by Krishna Kishore and Naba Kishore in favour of any of their descendants, and that the document merely declares their rights in future, and that such rights must therefore be regulated by the ordinary Hindu Law. But it will be observed that so far as Krishna Kishore was concerned, his son Ananda Kishore was then born and it may well be taken that he had before his mind that individual at least; and hence the bequest should be taken to be in favour of Ananda Kishore and such other sons as might be born to him thereafter and their male descendants. We are concerned in this case with Ananda Kishore alone and the estate left by him; and so far as he was concerned, as already indicated, it may be taken that there was a valid gift in his favour subject to the limitations prescribed.”

Their Lordships regret they cannot concur in the view expressed by the learned Judges of the High Court as to the meaning and intent of the parties executing the instrument. It is called a will, but the preamble states the object for which it is executed.

“Whereas,” it says, “body is mortal, it is impossible to say what may befall at what time, and as ruin may ensue from disputes relating to the shares arising in future amongst son, daughter, daughter’s son, and childless widow, unless some rules are regularly framed, and it has accordingly become necessary to prescribe a set of rules in that behalf, and hence the rules mentioned below are laid down; these shall become operative and come into force on our death.”

This preamble may rightly be regarded as the key to the policy of the document, and so far as it goes there does not

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appear to be any intention on the part of the executants to make any gift. The whole purpose in view was to keep the property in the lineal male line, and with that object rules were framed to prevent its devolution to female heirs and male heirs connected through them.

The first paragraph declares that the executants, their sons, grandsons, and "other heirs" shall take the properties "in the manner stated below," that is, subject to the restrictions imposed in the document, "in equal shares" and that none will have the power of making the shares unequal.

Paragraph 2 is in these terms:—

"If one of us two, or his son be living and the other or his son be not living, then the said surviving person or his son shall get all the moveable and immoveable properties left by the deceased, with rights of ownership. A sonless widow or daughter or daughter's son shall have no sort of right or title to and any concern whatever with that property, but shall only get, during their life time, food and clothing, &c., as is provided in the 5th paragraph."

Paragraph 3 declares that the sons and grandsons of the executants shall have full power to deal with the properties "left by them in any way they wish in their rights as full owners."

Paragraph 4 provides that only on failure of male progeny in the direct male line of either of the executants, widows, or daughters, or daughters' sons are to get shares "according to the *Shastras*."

Paragraphs 5 and 7 make provisions for the maintenance of widows and daughters.

Paragraph 6, which relates to the guardianship of any minor son left by either of the executants, is immaterial.

Paragraph 8 defines the word *putra*, used in the document, that—

"It shall mean son, son's son, son's son's son, and adopted son and his son, &c., being male issues, and the words written in this will are to be taken in their plain sense, and not in any distorted far-fetched sense."

And they declare finally that—

"The rules that we two uterine brothers prescribe by this will as between ourselves shall continue to prevail, and be operative down to our sons, grandsons, &c., successively."

Throughout the instrument there is no indication of an intention to make a gift to any person; whilst paragraph 4 clearly shows that the "sons and grandsons" who took the properties left by the executants acquired them as "full owners." There was no restriction on their powers to deal with such properties "in any way they wished." But, although they acquired the estate as absolute owners, it was not to descend in the legal channel according to the prescriptions of the Hindu Law, but in accordance with the rules framed by the executants with the avowed object stated in the preamble. It was only on the indefinite failure of male issue in both branches that the female heirs or their descendants were to receive the shares prescribed for them in the *Shastras*.

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This is the general policy of the instrument. It was clearly intended to vary the rule of Hindu law, and to control the devolution of the properties until the indefinite failure at some remote period of the male line of both brothers. That such an attempt to alter the mode of succession prescribed by law is illegal is enunciated in the clearest terms in the judgment of this Board in the *Tagore Case* (1). As their Lordships there observe:—

"Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognised) by the State, not merely for the benefit of individuals, but for reasons of public policy.

"It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Soorjeemoney Dossce v. Denobundoo Mullick* (2), 'A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy'."

The learned Judges of the High Court had present in their minds the difficulty of reconciling the acquisition by each individual male descendant of full rights of ownership in the property that descended to him with the restraint im-

(1) (1872) L. R. I. A. Sup. Vol. (2) (1857) 6 Moo. I. A. 526, 555.  
 47, 64, 65; 9 B. L. R. 377.

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posed on its devolution. And, therefore, to give effect so far as possible to the intention of the executants they considered that the absolute estate Ananda acquired "was defeasible in the event of his death without male issue." If the attempt to interfere with the course of descent according to law is to be regarded as a condition of defeasance, it was applicable not merely to the case of Ananda, but to the case of every male descendent who happened to leave no male issue; and its application might have been postponed for an indefinite period. Their Lordships are not aware of any authority to warrant such a provision. Nor is there any for the contention that under the instrument in question there was a devise in favour of Ananda with a gift over to Naba Kishore, the uncle. As the Subordinate Judge very properly observes in his judgment, "the question is not whether the gift over was good in the event which happened afterwards but whether it was good in its creation."

It is clear from the document that if there was any idea at all in the mind of Krishna Kishore of a gift over in favour of Naba or his male descendants, it was dependent on the contingency of the indefinite failure of male issue in his own line. At the time the document was executed there is no reason to suppose that he contemplated that his son would die without issue, or that Naba would survive him. And therefore if it were assumed that a gift over was intended, it would be wholly invalid in view of the clear rule of law laid down in the *Tagore Case* (1).

Their Lordships, however, have no doubt that the sole intention of the executants in this document, as they expressly avowed in the preamble, was to alter the rule of succession in their family which they had no power to do.

In their Lordship's judgment the plaintiffs are entitled to a decree for the properties in respect of which their claim was allowed by the First Court. The High Court disagreed with the Subordinate Judge on the question of the liability of the respondents to render accounts. It held that if the plaintiffs were entitled to a decree in the action they would

(1) (1872) L. R. I. A. Sup. Vol. 47; 9 B. L. R. 377.

also be entitled to an account from the defendants as legal representatives of Naba Kishore, their father, for the rents and issues of Ananda Kishore's estate whilst in his hands. There can be no question that this is the right view.

Their Lordships are of opinion that the judgment and decree of the High Court should be set aside, and that of the First Court restored, with a modification declaring the liability of the respondents as legal representatives of their father Naba Kishore to account for the period the estate left by Ananda Kishore was in Naba Kishore's hands. There should also be a declaration that the rights of the parties which have come into existence since Tripura Sundari's death, in respect of the properties conveyed by her to Krishna Kishore and Naba Kishore in 1862, shall not be affected by the result of this case.

The respondents will pay the costs of this appeal and of the proceedings in the High Court.

And their Lordships will humbly advise His Majesty accordingly.

*Appeal allowed.*

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitor for the respondents: *W. W. Bor.*

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## APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,  
and Mr. Justice Coxe.

PARESH NATH MALLICK

v.

HARI CHARAN DEY.\*

1911

April 28.

*Execution of Decree—Sale—Application to set it aside—Fraud should be definitely established—Irregularity, how far it affects Auction-purchaser—Second application for setting aside sale, if it lies.*

The word "fraud" is very loosely used in the class of cases instituted for setting aside sales, any irregularity being taken to be *fraud*, with all the consequences that such a finding involves. A finding of fraud, however, should be reserved for that which is dishonest and morally wrong; and it is not sufficient to come to a vague general finding of fraud; actual fraud must be established.

A Court should have much hesitation in visiting an innocent auction-purchaser at one of its sales with the consequences of an irregularity or defect of procedure, which was not discovered by the Court or its officers, at the time of sale, and was not apparent on the face of the record.

Where an application to have a sale set aside was dismissed for default and the application for restoration was rejected, it is doubtful whether the applicant can successfully prefer a second application for the same purpose.

*Lalla Bunsedthur v. Koonwur Bindesree Dutt Singh* (1), and *Malkarjun v. Narhari* (2) referred to.

*Khairajmal v. Daim* (3) distinguished.

SECOND APPEAL by Paresb Nath Mallick, the auction-purchaser.

This appeal arose out of an application for setting aside a sale held under the execution of an *ex parte* decree. The *ex parte* decree was dated 1903. The application for execution

\* Appeal from Order, No. 305 of 1910, against the order of W. N. Delevingne, District Judge of Hooghly, dated March 31, 1910, affirming the order of Taraprasanna Chatterjee, Munsif of Serampur, dated Oct. 1, 1909.

(1) (1866) 10 Moo. I. A. 454. (3) (1904) I. L. R. 32 Calc. 296.

(2) (1900) I. L. R. 25 Bom. 337;

L. R. 27 I. A. 216.



was made on the 19th July, 1905, and the sale sought to be set aside was held on the 12th February, 1906. The *ex parte* decree was sought to be set aside by an application for rehearing filed on the 17th May, 1906, and another application for setting aside of the sale was filed on the 21st May, 1906. This application for setting aside of the sale was dismissed for default on the 18th August, 1906. An application for rehearing was filed on the same day. The application for setting aside the *ex parte* decree was granted and the suit restored on the 1st September, 1906. The application for rehearing was rejected in March, 1907; the matter went up in appeal to the District Judge, and the appeal was dismissed on the 1st July, 1907. The suit, being restored, was tried afresh and a modified decree was passed, the *jama* being altered. Appeal was preferred, but the result was substantially maintained. Then the application now in appeal was made on the 5th February, 1909.

The auction-purchaser, who was one of the defendants in the suit and is the appellant in the High Court, contended that the application was barred by section 11, read with section 141 of the Code of Civil Procedure, 1908, as also Art. 166 of the First Schedule of the Limitation Act, 1908. In answer, it was contended on behalf of the applicant that section 47 of the Code should apply to the case. On behalf of the auction-purchaser, it was contended, in reply, that the decree could not be impeached in an application under s. 47. The Munsif upheld the contention of the applicant and was of opinion that though the *istahar* was served, it was served irregularly, and that there was substantial injury to the petitioner by the sale. The Munsif also overruled the contention of the auction-purchaser that the sale could not be set aside to his prejudice, he being a third party. The sale was accordingly set aside.

On appeal, the District Judge confirmed the decision of the Munsif and held further that, having regard to the provisions of section 144 of the Code, a separate suit for setting aside the sale was not necessary when the decree was set aside.

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The auction-purchaser, thereupon, appealed to the High Court.

*Babu Dwarkanath Mitra*, for the appellant. My client is an innocent auction-purchaser. Both Courts have negatived fraud on the part of the auction-purchaser. As such, the sale cannot be disturbed, even though the *ex parte* decree in execution of which the sale took place has been subsequently set aside and a modified decree passed. I rely on the decision of the Judicial Committee in *Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan* (1), and in *Rewa Mahton v. Ram Kishen Singh* (2). It is true those were not cases of *ex parte* decrees, but the principle is the same. An *ex parte* decree is not a decree made without jurisdiction. At the time the sale took place the decree was a subsisting and a good decree and a sale made thereunder is good. The Court was satisfied under the provisions of section 100 of the Code that there was proper service of summons. It might have been wrong in so holding. But the Court had jurisdiction to decide wrong as well as right. The purchaser need not look beyond that: *Malkarjun v. Narhari* (3). *Khiaarajmal v. Daim* (4) clearly does not apply, for there the parties affected were not represented at all in the proceedings. There are cases also where the question similar to this was raised: *Ram Narain Tewari v. Shew Bhunjan Roy* (5), *Mukhoda Dassi v. Gopal Chunder Dutta* (6), *Syed Nathadu Sahib v. Nallu Mudaly* (7), and *Set Umedmal v. Srinath Ray* (8). All the above were cases where sales took place in execution of *ex parte* decrees.

[JENKINS C.J. See *Chitambar Shrinivasbhat v. Krishnappa* (9).]

The Code lays down certain procedure to set aside *ex parte* decrees. These provisions would have been wholly un-

(1) (1887) I. L. R. 10 All. 166.

(2) (1886) I. L. R. 14 Calc. 18.

(3) (1900) I. L. R. 25 Bom. 337;  
I. R. 27 I. A. 216.

(4) (1904) I. L. R. 32 Calc. 296.

(5) (1899) I. L. R. 27 Calc. 197.

(6) (1899) I. L. R. 26 Calc. 731.

(7) (1903) I. L. R. 27 Mad. 98.

(8) (1900) I. L. R. 27 Cal. 810.

(9) (1902) I. L. R. 26 Bom. 543.

necessary if *ex parte* decrees were regarded as decrees made without jurisdiction. No proceedings would then be required to set aside these decrees.

My last contention is that the previous application for setting aside the sale having been dismissed for default, the present application is not maintainable. The respondent's application for review of the order passed on default was also rejected.

*Babu Baidyanath Dutt*, for the respondent. The *ex parte* decree was a decree made without jurisdiction.

In *Khiairajmal v. Daim* (1), the Judicial Committee held that sale of property of persons not parties to the decree under which the sale was held is void and must be treated as a nullity. The Court by setting aside the *ex parte* decree held that there was no service of summons. That being so, the Court had no jurisdiction to pass the decree.

[JENKINS C.J. But the Court decided in the previous proceeding that there was proper service of summons. It had jurisdiction to decide that: *Malkarjun v. Narhari* (2) applies to this case.]

I submit, further, that the Munsif has found that the sale was vitiated by fraud; and there are numerous cases in the reports which go to show that a sale must be set aside even though the auction-purchaser be not a party to the fraud.

[COXE J. But those were all cases, I suppose, where application was made prior to the confirmation of sale.]

In any event, the case should be sent back for determination of the question of fraud by the Court of appeal.

JENKINS C.J. This appeal arises out of an application to set aside a sale held in execution of a decree for money. This decree was passed *ex parte* in 1903 and on the 12th of February, 1906, there was a sale in execution of this decree at which the appellant before us became the purchaser. It is this sale that is now impugned. On the 17th of May, 1906,

(1) (1904) I. L. R. 32 Calc. 296.

(2) (1900) I. L. R. 25 Bom. 337;  
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an application was made to have the decree set aside, and on the 21st of May an application was made to have the sale set aside. On the 19th of August this application to have the sale set aside was dismissed, and though an application was subsequently made for its restoration that application was rejected. On the 1st of September, 1906, the decree was set aside, and the suit was restored, with the result that a modified decree was passed in the plaintiff's favour. On the 5th of February, 1909, the present application was made to have the sale set aside.

I may deal with one point at once. It is the suggestion that there is fraud in this case. That suggestion is based upon a remark by the Munsif to this effect: "the auction-purchaser is in no way connected with the fraud proved in this case." Though the Munsif there implies that there was fraud, there is nothing in his judgment which justifies the conclusion of fraud. The view that there was fraud manifestly did not find favour with the District Judge, because he makes no reference to it and there is nothing direct or indirect in his judgment that suggests that he thought there was fraud. The fact is that the word *fraud* is very loosely used in this class of cases; any irregularity is taken to be fraud with the consequence that such a finding involves. But a finding of fraud should be reserved for that which is dishonest and morally wrong: and it is not sufficient to come to a vague general finding of fraud: actual fraud must be established. In this view of the case it is unnecessary for me to consider the question that has been argued before us, whether, if there be fraud, an auction-purchaser is affected by it, though he himself may be innocent of the fraud. It is said that there is authority to that effect. But should the case arise for consideration, I think it would be undesirable for any Court to come to a conclusion upon that point, without having regard to what was laid down by their Lordships of the Privy Council in *Lalla Bunscedhur v. Koomwur Bindeseree Dutt Singh* (1). The ground on which the decree of 1903 was set aside was

(1) (1866) 10 Moo. I. A. 454, 473.

that it was *ex parte* and the summons had not been served. Therefore, those conditions were established which entitled the aggrieved defendant to have the decree set aside under section 108. But though the decree was thus set aside in September, 1906, the Court could not have passed its decree in 1903 without holding that the summons had been duly served: that is the condition laid down by section 100 of the Civil Procedure Code of 1882. So we have this position, that the Court wrongly, as events have subsequently shown, found that though the defendant was not present the summons had been duly served. The purchaser was entitled to rely on that finding. He had not the opportunity or the means of questioning the propriety of the decision at which the Court had arrived when it determined that the conditions were established entitling it to pass an *ex parte* decree: and the Court should have much hesitation in visiting a purchaser at one of its sales with the consequences of an irregularity or defect of procedure which was not discovered by the Court, or its officers, and was not apparent on the face of the record. The position then is that under a decree, to all appearances in order, the present appellant became a purchaser. Why is he to be deprived of the benefit of his purchase? I have already said there was no fraud to which he could have been a party. At the same time it is the policy of the Court and a very wise policy to protect its purchasers, for although in an individual case there may be some hardship, it would be far more prejudicial to the general body of judgment-debtors that any doubts should be thrown upon titles acquired by purchasers in execution under decrees which are to all appearances in order and free from objection. The decree under which the appellant bought was not a nullity, it stood until it was set aside, and so the doctrine laid down in *Khia-rajmal v. Daim* (1), has no application. On the contrary what was said by the Privy Council in *Malkarjun v. Narhari* (2), is apposite. Lord Hobhouse there said, "It was contended

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that the person served was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution; and in so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken the decision, however wrong, cannot be disturbed." So here, as I have already indicated, the Court decided in 1903 that there was sufficient proof of the service of summons. It was entitled so to decide, and the purchaser was entitled to rely on that decision.

In the circumstances it appears to me that there is no sufficient ground on which the purchase by the appellant, an innocent purchaser for value, should be disturbed, and I therefore hold the decree of the lower Appellate Court should be reversed and the application dismissed.

The appellant is entitled to his costs in all the Courts.

COXE J. I agree.

*Appeal allowed.*

S. M.



## PRIVY COUNCIL.

MAUNG PE

v.

MA LON MA GALE.

P.C.\*  
1911March 28;  
May 9.

[On appeal from the Chief Court of Lower Burma, at Rangoon.]

*Husband and Wife—Suit by husband for divorce on the ground of wife's fault—Allegation of her theft of jewellery belonging to husband—Wife's abandonment of defence and submission to decree for divorce—Decree not by mutual consent—Subsequent suit for partition of property—Civil Procedure Code (Act XIV of 1882), ss. 42, 43—Objection taken for first time on appeal.*

For the purpose of dealing with and distributing, in accordance with the Burmese Buddhist law, property belonging to a husband and wife, who have been divorced, it was necessary, in a suit brought by the husband for partition, to determine whether the divorce was by mutual consent or was granted on the fault of the wife. It appeared from the husband's claim to a divorce that he set forth the wife's offence that she had by sundry fraudulent devices stolen certain jewels which were his property, and he asked for a decree on that ground alone. The wife in her defence denied the allegations as to her misconduct, and asked for the dismissal of the suit with costs. Witnesses were summoned, but on the day fixed for hearing she abandoned her defence, and, although continuing to deny her guilt, consented to a divorce, and judgment was therefore given for a "decree as prayed."

*Held* (upholding the decision of the District Judge), that the divorce was not made by mutual consent. The proceedings disclosed not an agreement between husband and wife, but a claim by the husband to which the wife submitted.

It was objected for the first time on appeal to the Chief Court that the husband had no right to partition of the property unless he asked for it in the suit for divorce. The Chief Court held that the matter being one of procedure must be determined by sections 42 and 43 of the Civil Procedure Code of 1882, and decided that having failed to include in his suit for divorce a claim for partition he must be taken to have relinquished it, and his subsequent suit for that relief was barred.

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*Held*, that it was too late to raise the point for the first time in the Court of Appeal.

*Held*, also, (reversing the decision of the Chief Court), that sections 42 and 43 were not applicable to a case like the present. The cause of action for divorce was the misconduct of the wife, and the cause of action for the partition was the divorce of the wife founded on that misconduct. The evidence needed in each case was also different, and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition could properly arise. If the Court found that the plaintiff had unnecessarily severed his claim for a partition from that for a divorce, it could punish him by the exercise of its discretion as to costs; but such a severance did not come within the mischief aimed at by sections 42 and 43 of the Code so as to bar the claim to a partition which may be founded on the decree for divorce itself.

APPEAL from a judgment (July 5th, 1909) of the Chief Court of Lower Burma on its Appellate Side, which reversed a judgment (March 18th, 1908), of the District Court of Hanthawaddy.

The plaintiff was the appellant to His Majesty in Council.

The facts giving rise to this appeal were that prior to June 6th, 1907, the plaintiff and defendant, who were Burmese Buddhists, were husband and wife, and the plaintiff shortly before that date had filed a suit for dissolution of the marriage under Burmese Buddhist Law, the marital offence alleged as ground for the divorce being that the defendant had stolen or misappropriated certain jewels which were the plaintiff's property.

The wife's defence was a denial that she had committed the alleged offence, but she subsequently, on 6th June, 1907, submitted to a decree being passed against her with costs.

On the 29th August, 1907, the plaintiff instituted the suit out of which the present appeal arose. It was brought to recover property which he alleged was in possession of the defendant his divorced wife, to which he was entitled under Buddhist law on partition after divorce for her fault, of their joint property; and he claimed to recover the whole of the property brought in by him and the property and profits acquired during coverture. The property was fully specified in the plaint the total value being about Rs. 18,000.

The defendant in her written statement alleged that as she consented to a divorce it was one by mutual consent only in which case the shares in the partition would be different from those claimed in the plaint; that some of the property claimed was her own and not joint property; that the lost jewellery was stolen, but not by her, and she never promised, as alleged in the plaint, to replace it; and she denied that there was any property at the time of the divorce subject to partition; and objected to the plaintiff's claim as not taking into consideration debts for which there was a joint liability.

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Issues were raised as follows:—(1) Was the divorce by mutual consent? (2) Is defendant responsible for the loss of the jewellery (*nagats*) and what was the value? (3) Were they the separate property of the plaintiff? (4) What property was acquired during the marriage and what is its value? (5) Are there any debts liable to be apportioned? (6) Did plaintiff contribute cash to the marriage which he is entitled to recover?

On the 1st issue the District Judge decided that the divorce was not by mutual consent. He said:—

"This is really the cause of the whole case. Plaintiff's position is that he divorced his wife for fault, namely, theft or wrongful concealment of a pair of diamond ear-rings (their status will be considered later) and is therefore entitled to the property brought to the marriage and obtained during it. Defendant said that she agreed to the divorce. The divorce proceedings form Case No. 189 of 1907 of the Township Officer, Kyauktan. It is not altogether satisfactory. Defendant at first contested the case: issues were framed and witnesses summoned: the case was postponed for attendance of witnesses and on the day, subsequently fixed, defendant put in a petition saying that she denied any guilt, but consented to a divorce. A divorce was then granted with costs. No specific findings were recorded on the issues framed. The divorce, however, was granted to plaintiff and he got his costs. I do not consider that this can in any way be held a divorce by consent. There was no joint petition of compromise or any arrangement that each side should pay its own costs.

Defendant abandoned her case. On this issue I find that the divorce was not by mutual consent, but that plaintiff obtained a divorce from defendant in the Law Court in a suit for divorce based on fault."

On issues 2nd and 3rd the District Judge found that the *nagats* were not the separate property of the plaintiff, but were "*kanwin*" or "property set apart at the time of the

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marriage by the bridegroom for the joint purposes of the married pair," that the defendant was responsible for their loss, and that their value was Rs. 2,250, and not Rs. 3,500 as claimed by the plaintiff; on the other issues the District Judge found that the balance acquired when the debts were set off was only Rs. 1,745; that no debts were outstanding at the time of the divorce, and that the whole amount decreed should be Rs. 6,122.

On 26th March 1908, an appeal was preferred by the defendant to the Chief Court, the main grounds alleged being that the decision of the District Court was wrong in law in holding that the divorce was not by mutual consent; that the jewellery was not subject to equal division as joint property; that the defendant was not liable to make good the loss of the jewellery alleged to be stolen; and that the judgment was against the weight of evidence and the probabilities of the case. Nearly 10 months afterwards, on 19th December, 1908, an additional ground of appeal was filed "that the District Court should have held the plaintiff disentitled to relief by reason of his failure to enforce his rights as regards property in the prior proceedings in which he sued for a divorce."

The decision of the Chief Court (SIR C. E. FOX, Chief Judge and PARLETT J.) was confined wholly to the last-mentioned ground of appeal. The judgment so far as it was material was as follows:—

"In the second suit the District Judge has found that the divorce was not by mutual consent, but that the plaintiff obtained a divorce from the defendant in the Township Court in a suit based on fault. It is unnecessary to discuss this enigmatic finding in view of the other matters which arise in the second suit.

It has been argued for the appellant that, apart from the merits, the plaintiff was not entitled to any of the relief he claimed in this suit because he failed in the first suit to ask for enforcement of his rights regarding property. This is the first matter for consideration, and if it is decided in favour of the defendant the other matters need not be gone into. The following cases bearing on the question have been cited:—

In *Ma Gyan v. Maung Su Wa* (1) the head-note represents Burgess, Judicial Commissioner, to have held that under Buddhist Law (1) (1897) 2 Upper Burma Rul. 1897—1901 Divorce 28.

a suit for a bare divorce without partition of property will not lie. In *Maung Pye v. Ma Me* (1) Adamson, Judicial Commissioner, disputed the correctness of the head-note, and said that the real purport of Burgess, Judicial Commissioner's judgment was that a suit for a divorce merely would bar a subsequent suit for partition of property between the parties, and that such a suit might be unnecessary and superfluous if the husband did not object to divorce without partition. Subsequently in *Maung Tha So v. Ma Min Gaung* (2) Adamson, Judicial Commissioner, distinctly dissented from what he took to be Burgess, Judicial Commissioner's ruling in *Ma Gyan v. Maung Su Wa* (3).

In *Maung Tha Chi v. Ma E Mya* (4), Birks, Judge, in this Court also dissented from Burgess, Judicial Commissioner's ruling. In his opinion the termination of the marriage status was in itself a sufficient cause of action, and until this question was settled the grounds for partition of the property do not arise. In *Maung Shwe Lon v. Ma Ngwe La* (5) Burgess, Judicial Commissioner's ruling was followed, and it was held that a Buddhist who had sued for divorce being himself in fault, but offering no partition of property had no right of suit for a divorce only.

In *Mi Kin Lat v. Nga Bon So* (6), Shaw, Judicial Commissioner, took occasion to consider fully the *Dhammathats* and rulings bearing on the subject. It appeared to him to be perfectly clear that the *Dhammathats* treat the division of property as part of the law of divorce. He adopted as a correct statement of the Buddhist Law a passage in Burgess, Judicial Commissioner's judgment in *Ma Gyan v. Maung Su Wa* (3), in which he said 'throughout all the texts relating to the subject of divorce, the principal object of the rules laid down appears to be to provide for the disposal of the property pertaining to husband and wife.'

I also agree in thinking that this passage contains a correct statement of the law, but I do not think it follows from it that, as stated in the head-note to *Ma Gyan v. Maung Su Wa* (3), a suit for bare divorce without partition of property will not lie, or that there is no cause of action for divorce without and as distinct from division of property.

Taking the case of a claim for divorce by a husband on the ground of fault in the other party, which is the case we have now to deal with, I think that the Buddhist Law must be looked to, and by it must be determined the rights of the party aggrieved, and the remedies to which he is entitled; but as regards the form of suit he brings and the consequences of his bringing a wrong form of suit, this being a matter of procedure, the Civil Procedure Code must determine the matter. Taking it to be the case that various specified

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(1) (1902) 2 Upper Burma Rul.  
1902-03 Divorce 6.

(2) (1903) 2 Upper Burma Rul.  
1902-03 Divorce 12.

(3) (1897) 2 Upper Burma Rul.  
1897-1901 Divorce 28.

(4) (1900) 1 Lower Burma Rul. 7  
(5) (1902) Chan Toon's L. C.

App. 177.

(6) (1905) 2 Upper Burma Rul.  
1904-06 Divorce 3.



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forms of fault on the part of one of a married couple governed by Burmese Buddhist Law give to the other party a right to a divorce and to a division of the joint property or to the whole of it, it appears to me that the fault committed constitutes the cause of action for both the divorce and the separate possession of either the whole or part of the property.

In *Maung Tha So v. Ma Min Gaung* (1), Adamson, Judicial Commissioner, said that a test in deciding whether the cause of action in two suits is the same is whether the same evidence would support both, and he proceeded to say that in a suit for divorce the cause of action is concerned with the conduct of the parties only and not with the property, whereas in a suit for partition the cause of action and the evidence would be entirely different. The foundation of the claims however is the same in both cases, and in neither case could the plaintiff succeed, unless he proved the foundation of his claim, namely, the fault of the other party. The cause of action does not become different, because, when seeking two remedies arising out of one right, more evidence has to be given than if only one remedy is sued for. The cause of action being in my opinion the same, the law of procedure laid down for our Courts says that the whole of the claim which a plaintiff is entitled to make in respect of a cause of action must be made in any suit founded on that cause of action, and that if a person entitled to more remedies than one in respect of the same cause of action omits (except with the leave of the Court) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

In my view the remedies of a Burmese Buddhist spouse against his or her partner for matrimonial fault committed by him or her, being in some cases a divorce and a partition of or declaration of right to the whole of the joint property, or a decree ordering the other party to give up possession of it, the party who sues the other may ask for only a divorce if he or she so chooses, but if he or she chooses to sue for a divorce only, then unless the leave of the Court for a subsequent suit for the other remedies has been obtained in such suit, a subsequent suit in which such remedies are claimed is barred by the provisions of the Civil Procedure Code. On this view, *Maung Tha Chi v. Ma E Mya* (2) in this Court was wrongly decided.

I think that the suit from the decree in which this appeal is made was barred by the provisions of section 42 of the Civil Procedure Code of 1882."

The decision of the District Judge was accordingly reversed and the suit dismissed with costs.

On this appeal, which was heard *ex parte*,

J. W. McCarthy, for the appellant, contended that the cause of action for the divorce, and the cause of action for

(1) (1903) 2 Upper Burma Rul. (2) (1900) Lower Burma Rul. 7.  
 . 1902-03 Divorce 12.



the partition of the property, were wholly different, the cause of action for the former being the marital offence and the cause of action for the latter being the divorce; and, whether by procedure of Indian law or the doctrines of the Burmese Buddhist law, no right to partition arose until the divorce had been granted. Reference was made to *Maung Tha So v. Ma Min Gaung* (1). Section 42 of the Civil Procedure Code (Act XIV of 1882), therefore, which had been held by the Chief Court to bar the suit, was, it was submitted, not applicable; the procedure taken by the appellant had been in accordance with section 43 of the Civil Procedure Code. The Chief Court ought not to have allowed the amendment of the memorandum of appeal filed ten months after the appeal brought, by which a wholly new point had been raised. As the point had not been taken before, it should have been considered to have been waived. The case was, it was submitted, now in the position of one that had been disposed of by the Chief Court on a preliminary point of procedure, and moreover on a point which had been decided erroneously. Civil Procedure Code (Act XIV of 1882) sections 541, 542 were referred to. The decision of the District Judge that the decree for divorce was not granted by mutual consent was, it was also contended, correct.

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The judgment of their Lordships was delivered by

LORD ROBSON. This is an appeal from a judgment of the Chief Court of Lower Burma on its Appellate Side reversing a judgment in favour of the present appellant, who was plaintiff in the action, and directing that his suit be dismissed with costs. The respondent did not appear on this appeal.

May 9.

The appellant and respondent were Burmese Buddhists, and up to the 6th June, 1907, were husband and wife. Some time prior to that date the husband filed a suit against the respondent for dissolution of the marriage.

The alleged ground of divorce was that the respondent had, by sundry fraudulent devices, stolen certain jewels which were the property of the appellant. The question as

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to whether or not this is an adequate ground for a divorce according to Burmese Buddhist law has not been argued either in the Courts below or here, and their Lordships express no opinion upon it. It is sufficient to say that the divorce was granted, and its validity is not contested. The present dispute is concerned solely with the claim of the appellant to have the property in which the spouses were interested distributed, or dealt with according to Burmese Buddhist law.

The first point in dispute is whether the divorce was by mutual consent, or was granted on the fault of the wife. The husband filed his claim in January 1907. In it he set forth the respondent's alleged offence and he prayed for his decree on that ground alone. The respondent thereupon filed her defence denying the allegations as to her misconduct and asking that the suit be dismissed with costs. Witnesses were summoned, but on the day fixed for hearing the respondent abandoned her defence and, although continuing to deny her guilt, consented to a divorce. Judgment was thereupon given on the 6th June, 1907, for a decree "as prayed for."

Afterwards, in August 1907, the appellant brought the present action for the recovery of his property which he alleged his divorced wife still fraudulently kept in her possession, and for a partition of their joint property. The shares to which the parties would be respectively entitled under the partition would vary according to whether the divorce had been granted on the ground of a matrimonial offence or had been arranged by consent, and the respondent contended that under the circumstances above stated the divorce had been by consent and had not been granted by reason of her fault. The District Judge found in favour of the appellant on this point, but the Chief Court have cast some doubt upon that finding, although in view of their decision on another point in the case, which is dealt with later on, they did not think it necessary to discuss it fully. Their Lordships, however, think it desirable to state that they agree with the judgment of the District Judge on this point.

Although the respondent at the last moment abandoned her defence and consented to the decree, she certainly ought not to be put in the position of an innocent wife, who has contracted for a divorce on an equal footing with her husband. If she had invited her husband to enter into such an agreement before he began his action he would have been at liberty to refuse and to have insisted upon a decree establishing her guilt, in order to determine the basis upon which the subsequent partition should take place, and he was certainly placed in no worse position by the fact that he was obliged to bring the action in order to secure relief. The proceedings at law disclose, not an agreement between husband and wife, but a claim by the husband on a specific ground to which the wife in effect submitted.

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The ground on which the Chief Court set aside the decree of the District Judge in the present action, was that the appellant had no right to a partition of property unless he asked for it in the action for divorce.

There has been some conflict of decisions in the Burmese Courts upon this point, and the Chief Court held, on this appeal, that the matter being one of procedure must be determined by the Civil Procedure Code, sections 42 and 43.

Those sections are aimed against a multiplicity of suits in respect of the same cause of action and, shortly stated, they enact that if a plaintiff fails to sue for the whole of his claim or remedy in respect of a particular cause of action, he shall not afterwards sue in respect of the portion so omitted or relinquished.

It is to be observed that the objection founded upon these sections should have been treated as a preliminary point, but no notice of it was given by the respondent in the present action either in her defence, or at the trial, or in the grounds of appeal as first delivered. Under these circumstances, their Lordships are of opinion that she was too late to raise the point in the Court of Appeal except upon terms which would have indemnified the appellant for her omission to raise it at the proper time.

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With regard, however, to the point itself, their Lordships are of opinion that sections 42 and 43 of the Civil Procedure Code were not intended to bar an action like the present. The cause of action for the divorce was the misconduct of the wife, but the cause of action for the partition was the divorce of the wife founded on that misconduct. The partition may no doubt be treated as relief consequential upon the divorce and therefore dealt with in the same suit, but the evidence is different and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition can properly arise. There is, therefore, not necessarily any hardship on the defendant in severing the two matters. Indeed it may, and generally would, be the more convenient course finally to settle the question of the divorce and the misconduct before entering upon an enquiry as to partition which would be altogether unnecessary if the decree were refused, or would be put on a different basis if the misconduct were disproved. If the Court should be of opinion that a petitioner has unnecessarily severed his claim for a partition from his claim for a divorce it may, of course, punish the plaintiff by the exercise of its discretion as to costs, but their Lordships are of opinion that such a severance does not come within the mischief aimed at by sections 42 and 43 of the Civil Procedure Code so as to bar the claim to a partition which may be founded on the decree for divorce itself.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be allowed, the decree of the Chief Court set aside, and that of the District Court restored, with costs in both Courts.

The respondent will pay the costs of the appeal.

*Appeal allowed.*

Solicitors for the appellant:—*Bramall & White.*

J. V. W.

## APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

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Aug. 8.

*Jurisdiction—Undervaluation of suit—Change of Court of Appeal owing to undervaluation—Jurisdiction of Appellate Court—Judgment of Court having no jurisdiction, a nullity—Effect of such judgment—Consent-decree to the prejudice of minor or any reversionary heir, not binding on heir—Stranger, introduction of, into appeal, without leave of Court.*

A suit was intentionally undervalued. The defendants raised no objection as regards valuation, and the suit was tried. The appeal was filed before the District Judge instead of before the High Court, in consequence of the undervaluation, and the District Judge decided the appeal, by a consent-decree.

*Held*, that if a Court has no jurisdiction over the subject-matter of the litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities, and not only voidable; they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented.

These principles apply not only to Original Courts, but also to Courts of Appeal.

Jurisdiction cannot be conferred upon a Court of Appeal by consent of parties, and any waiver on their part cannot make up for the lack or defect of jurisdiction.

*Gurdeo Singh v. Chandrikah Singh* (1), *Baij Nath Singh v. Gajraj Singh* (2) *Gooroo Persad Roy v. Juggobundoo Mozoomdar* (3), *Golab Sao v. Chowdhury Madho Lal* (4), *Ledgard v. Bull* (5), *Minakshi Naidu v. Subramanya Sastri* (6), *Lawrence v. Wilcock* (7), *The Queen v. The*

\* Appeal from Original Decree, No. 389 of 1908, against the decree of Mahim Chandra Sarkar, Subordinate Judge of 24-Pergannahs, dated May 11, 1908.

(1) (1907) I. L. R. 36 Calc. 193.

(2) (1910) 7 All. L. J. R. 675.

(3) (1862) W. R. F. B. 15.

(4) (1905) 9 C. W. N. 956.

(5) (1886) I. L. R. 9 All. 191;  
L. R. 13 I. A. 134.

(6) (1887) I. L. R. 11 Mad. 26;  
L. R. 14 I. A. 160.

(7) (1840) 11 A. & E. 941.

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*Judge of the County Court of Shropshire* (1) and *In re Aylmer* (2) referred to.

When in a suit between a Hindu widow, and a claimant to the estate of her husband, a stranger who was not a party to the suit in the Original Court was made a party to the appeal without leave of the Court and a consent-decree made, the decree was not binding upon the reversionary heirs.

A Hindu widow, who is a limited or qualified owner, cannot confess judgment and be party to a consent-decree so as to bind the inheritance in the hands of the reversionary heirs.

*Katama Natchier v. The Rajah of Shivagunga* (3), *Stapilton v. Stapilton* (4) distinguished.

*Invrit Konwur v. Roop Narain Singh* (5) explained.

*Sheo Narain Singh v. Khurgo Koerry* (6), *Sant Kumar v. Deo Saran* (7), *Jeram Laljee v. Veerbai* (8), *Gobind Krishna Narain v. Khunni Lal* (9), *Mahadei v. Baldeo* (10), *Roy Radha Kissen v. Nauratan Lall* (11), *Asharam Sadhani v. Chandi Churn Mukerjee* (12) referred to.

A consent-decree does not operate to the prejudice of persons not parties thereto.

*Nicholas v. Asphar* (13), *In re South American and Mexican Company* (14) and *The Belcairn* (15) distinguished.

*Huddersfield Banking Company, Limited v. Lister* (16) followed.

APPEAL by the plaintiff, Rajlakshmi Dasee.

The properties in dispute belonged originally to one Rajballav Seal. Rajballav died on the 1st June, 1870, after having executed a will two days before his death, and leaving him surviving his widow, Mati Dasee (who was his third wife) and three daughter's sons, viz., Kali Das Sen, Bhola Nath Sen and Sarthak Chandra Sen. These three grandsons were the sons of Lakhya Hira, born of the second wife, Chandra Mani, who had predeceased her husband. Mati Dasee and three others, executors of the will, took out probate in July, 1870. Subsequently in March, 1873, Mati Dasee adopted one Jogendra Nath Seal, under the powers conferred on her by the will.

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| (1) (1887) 20 Q. B. D. 242, 248.                   | (8) (1903) 5 Bom. L. R. 885.         |
| (2) (1887) 20 Q. B. D. 258, 262.                   | (9) (1907) 1 I. L. R. 29 All. 487.   |
| (3) (1863) 9 Moo. I. A. 539.                       | (10) (1907) 1 I. L. R. 30 All. 75.   |
| (4) (1739) 1 White & Tud., 8th Ed., 234; 1 Atk. 2. | (11) (1907) 6 C. L. J. 490.          |
| (5) (1880) 6 C. L. R. 76.                          | (12) (1908) 13 C. W. N. 147.         |
| (6) (1882) 10 C. L. R. 337.                        | (13) (1896) 1 I. L. R. 24 Calc. 218. |
| (7) (1886) 1 I. L. R. 8 All. 365.                  | (14) [1895] 1 Ch. 37.                |
|                                                    | (15) (1885) 10 P. D. 161.            |
|                                                    | (16) [1895] 2 Ch. 273.               |



This Jogendra Nath married Katyayani Dasee. Katyayani was the daughter of one Kanai Lal Sen, and the mother of the plaintiff in the suit in appeal. On the 30th November, 1886, Jogendranath, the adopted son, died, leaving Katyayani, his widow, as his sole heir and the plaintiff as his only child. On the 18th April, 1888, Mati Dasee again adopted Amulya Charan. Amulya Charan was a son of the aforesaid Kanai Lal. In October, 1901, Amulya brought a suit for construction of the will of Rajballav and for the establishment of the validity of his adoption. It was ultimately held by the High Court that the adoption of Amulya was invalid and that the *corpus* of the estate vested in law in Jogendra Nath and subsequently passed by succession to his widow, Katyayani. Amulya died shortly after the High Court decision, in April 1905.

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On the 13th January, 1903, *i.e.*, about a week after the dismissal of Amulya's suit by the Subordinate Judge at Alipur, Katyayani brought a suit in the same court against Kali Das, and Bhola Nath and Amulya Charan for possession of the entire properties left by Rajballav. Barada Kanta Sarkar, an officer of the Court, who had been appointed receiver of the estate in the suit by Amulya was also made a defendant. This suit was valued at only Rs. 2,100, while Amulya's suit was valued at Rs. 10,500. The suit was decreed in December, 1905. Meanwhile Amulya had died, and his natural father, Kanai Lal, had been substituted in his place. His name was, however, subsequently struck off at his own request. Kali Das also died in September, 1905, and his son Bankim was substituted in his place. Then Bankim Chandra and Bhola Nath preferred an appeal on the 16th February 1906, before the District Judge, making Kanai Lal a party respondent. On the 19th January, 1907, one Shib Krishna Das, a mortgagee of a portion of the estate, was also added as a party respondent, with the consent of all parties. On the same date, a petition of compromise was filed, by the terms of which a compromise-decree was subsequently passed conferring absolute interest upon Katyayani (the plaintiff in that suit), in six annas share of the properties, another six annas was given to Kanai Lal and the re-

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maintaining four annas to the Sen defendants and the share of the Sens was to be subject to the mortgage of Shib Krishna. The suit was remanded to the lower Court for partition.

The suit out of which the present appeal arose was then brought by Rajlakshmi, the daughter of Jogendra the first adopted son of the testator, against six persons: (i) her mother, Katyayani, (ii) Bankim Chandra, son of Kali Das, (iii) Bhola Nath, (Kali Das and Bhola Nath being the daughter's sons of the testator by his daughter, Lakhya Hira, who predeceased him), (iv) her maternal grandfather, Kanai Lal, (v) Shib Krishna, the mortgagee from the daughter's sons, and (vi) Barada Kanta, the receiver appointed to take charge of the estate in a previous litigation about the same property. The suit was for a declaration that the consent-decree made between her mother, Katyayani, and other persons who claimed title in that property, was in no way binding upon her and could not possibly affect her position as the reversionary heir of her father, Jogendra. She also prayed in the alternative that if the Court found any sum was advanced by his maternal grandfather, Kanai Lal, for the benefit of the estate, such sum might be declared a debt of the estate, and she contended that his maternal grandfather could never have a share in the estate in lieu of money advanced by him.

The Subordinate Judge disallowed all the claims of the plaintiff, with this exception that under the compromise-decree, which was held to be valid, the mother, Katyayani, was declared to have a Hindu widow's estate, and not an absolute estate in the six annas share of the property given to her by the compromise-decree. Under the special circumstances of the case, which are narrated in detail in the judgment of the High Court, the Subordinate Judge ordered each party to bear its own costs.

The plaintiff, thereupon, appealed to the High Court.

*Babu Mahendranath Roy* (with him *Babu Birajmohan Majumdar* and *Babu Mohinimohan Chatterji*), for the appellant. The compromise was effected from interested motives.

[MOOKERJEE J. If an honest *bona fide* compromise was meant to be effected, the reversioner would have been brought in. Is there any explanation why she was not?]

Kanai as a creditor could not claim any portion of the estate and the compromise so far as he was concerned was outside the scope of the suit.

Katyayani did not quite realize what the effect of the compromise would be. She thought she was justified in giving away a portion to her father in consideration of all that her father had done, and that otherwise all her estate would go. That was not true.

The gross undervaluation of the third suit throws a flood of light in the history of the litigation concerning this property. Then, again, jurisdiction created by fraud or positive concealment of facts, would not bind a stranger to the suit. It is open to the plaintiff in the present suit to challenge the jurisdiction of the District Judge to entertain the appeal and to pass a decree on compromise. Assuming that the District Judge had jurisdiction to do all this, the compromise-decree would not be binding on the reversionary heir of Jogendra's estate. *Gobind Krishna Narain v. Khunni Lal* (1), *Roy Radha Kissen v. Nauratan Lall* (2), *Asharam Sadhani v. Chandi Churn Mukerjee* (3). The case of *Stapilton v. Stapilton* (4) cannot apply to the case of a Hindu widow.

*Mr. B. Chakravarti* (with him *Babu Ramcharan Mitra, Babu Umakali Mookherji, Babu Dwarkanath Chakrabarti, Babu Samatulchandra Datta, Babu Narendrachandra Basu and Babu Prabhashchandra Mitra*), for the respondents. When the father of the plaintiff died, he left no interest to be inherited. Nothing vested in the adopted son. He was entitled to participation of a share in the income until the death of his adoptive mother, or until he attained the age of 21 years. He never attained that age. Whatever vested in him was liable to defeasance on his death in the lifetime of the widow.

(1) (1907) I. L. R. 29 All. 487.

(2) (1907) 6 C. L. J. 490.

(3) (1908) 13 C. W. N. 147.

(4) (1739) 1 White & Tud., 8th Ed., 234; 1 Atk. 2.

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if he left no male issue and before attaining majority. The income remained in the trustees, partly for his enjoyment, and partly for the benefit of the grandsons. On such defeasance there is a specific gift over to the son to be adopted on the death of the first adopted son dying without male issue and before attaining the age of 21. Clause for defeasance is perfectly good, as also the gift over. If the latter is bad, the clause for defeasance is not. See Theobald on Wills, 7th ed., page 652; *Blomfield v. Eyre* (1). So after the death of the second adopted son his heirs would get.

On successive adoptions and rights of adopted sons, see *Mussumat Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (2), *Manikyamala Bose v. Nanda Kumar Bose* (3), *Suryanarayana v. Venkataramana* (4), *Vellanki Venkata Krishna Rao v. Venkata Rama Lakshmi* (5); see also: *Hurst v. Hurst* (6), *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (7), *Bireswar Mukerji v. Ardha Chander Roy* (8) and *Sarat Chandra Mullick v. Kanai Lall Chunder* (9).

*Babu Mahendranath Roy*, in reply. Judgment of High Court on appeal in suit No. 10 of 1902, acts as *res judicata* on the question of gift over. The son's, the testator's daughter's sons, might have appealed to the Privy Council. The sons are also bound by the decree of the suit filed by them on the Original Side of the High Court.

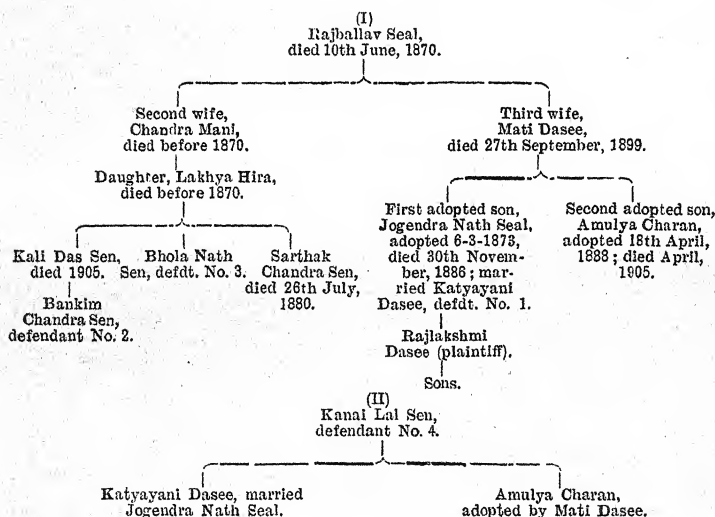
*Cur. adv. vult.*

MOOKERJEE AND CARNDUFF JJ. This is an appeal on behalf of the plaintiff in a suit for declaration that a consent-decree to which she was not a party, is in no way binding upon her in respect of the estate dealt with by that decree. The

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| (1) (1848) 5 C. B. 713;<br>75 R. R. 827.                | (5) (1876) I. L. R. 1 Mad. 174;<br>L. R. 4 I. A. 1.      |
| (2) (1865) 10 Moo. I. A. 279;<br>3 W. R. P. C. 15.      | (6) (1882) 21 Ch. D. 278.                                |
| (3) (1906) I. L. R. 33 Calc. 1306.                      | (7) (1878) I. L. R. 4 Calc. 23;<br>L. R. 5 I. A. 138.    |
| (4) (1906) I. L. R. 29 Mad. 382;<br>L. R. 33 I. A. 145. | (8) (1892) I. L. R. 19 Calc. 452;<br>L. R. 19 I. A. 101. |
| (9) (1903) 8 C. W. N. 266.                              |                                                          |

subject-matter of the litigation out of which this appeal has arisen, belonged at one time to Rajballav Seal, a wealthy Hindu of the Subarnabanik caste, who died on the 1st June, 1870. Two days before his death, Rajballav made a testamentary disposition of his properties, moveable and immoveable, which were of considerable value and were situated principally in the suburbs of this city. He left him surviving his widow, Mati Dasee, and three grandsons by a daughter born of another wife, both of whom had predeceased him. The relationship between the principal parties to the present litigation may be illustrated by the annexed genealogical table:

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Upon the death of Rajballav Seal, probate of his will was taken out on the 16th July, 1870, by his executors, one of whom was his widow, Mati Dasee. On the 6th March, 1872, Mati Dasee adopted Jogendra Nath, who subsequently married Katyayani Dasee, the daughter of Kanai Lal Sen (the fourth defendant in the present suit). Jogendra died on the 30th November, 1886, when he is said to have been about 17 years old. He left him surviving his widow and an infant daughter, Rajlakshmi Dasee, at that time less than a year old. Rajlakshmi Dasee has subsequently married one Bholanath Dhar, and sons have been born to her; she is the plaintiff in the present liti-

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gation. After the death of the first adopted son, Jogendra Nath, Mati Dasee, purporting to act in accordance with the provisions of the will of her husband, took in adoption Amulya Charan, the son of Kanai Lal Sen. In other words, Kanai Lal, who had previously given his daughter in marriage to the first adopted son of Mati Dasee, upon the death of his son-in-law gave away his son to be adopted by Mati Dasee. Amulya Charan was never married, and died in April, 1905. Rajballav, as we have already stated, had, before his marriage with Mati Dasee, taken another wife, by name Chandra Mani, who predeceased him. By her he had a daughter Lakhya Hira, who also predeceased him. Lakhya Hira left three sons—Kali Das Sen, Bhola Nath Sen, and Sarthak Chandra Sen. The youngest of these, Sarthak, died unmarried on the 26th July, 1880, and whatever interest had been taken by him in the estate of his maternal grand-father Rajballav, vested in his brother Kali Das and Bhola Nath. Kali Das died in 1905, and left a son Bankim Chandra, who is the second defendant in this suit. Bhola Nath is the third defendant. Kanai Lal Sen is the fourth defendant. Katyayani Dasee, the widow of Jogendra and mother of the plaintiff, is the first defendant. The fifth defendant, Shib Krishna, is a mortgagee from the second and third defendants, while the sixth defendant, Barada Kanta, is a receiver appointed by the Court in a previous suit relating to the subject-matter of the present litigation. The plaintiff seeks for a declaration that a consent-decree which was made in a previous litigation between the first four defendants, is in no way binding upon her as the reversionary heir to the estate of her father, Jogendra Nath Seal. In order to make the relative positions of the parties intelligible, and to enable us to appreciate the questions raised in the present litigation, it is essential to set out in full detail the circumstances of the previous litigations relating to the estate of Rajballav Seal, and to explain how the consent-decree now impeached came to be made. We may add that the facts we are about to narrate are all matters of record, and have been derived from the records of



the previous litigations, which, at the request of the parties, we have called for and minutely examined.

Upon the death of Rajballav Seal and after probate of his will had been taken out by the executors mentioned therein, the estate came into their hands. Under the provisions of the will the income of the estate had to be divided in certain proportions between the grandsons of the testator on the one hand, and the widow on the other. On the 21st July, 1890, the surviving grandsons, Kali Das and Bhola Nath, commenced an action on the Original Side of this Court (Suit No. 336 of 1890) for construction of the will of Rajballav Seal, for determination of the rights of all parties thereunder, for administration of the estate, for accounts and for other incidental reliefs. The defendants to this action were the widow, Mati Dasee, executrix to the will of the testator, Henry Remfry and Bholanath Chunder, the other two executors mentioned in the will, Amulya Charan Seal, the second adopted son taken by Mati Dasee, and Katyayani Dasee, the widow of the first adopted son, Jogendra Nath; Mati Dasee resisted the claim substantially on the ground that the charges of misconduct were wholly unfounded, that, upon a proper construction of the will, the then plaintiffs were not entitled to a fourth share of the income claimed by them, that they were at best entitled to maintenance, and that they had been properly maintained by her since the death of the testator. The other executors, Remfry and Chunder, denied all liability on the ground that they had retired from the office of executor, and that the estate had been managed by Mati Dasee alone. Amulya Charan Seal, represented by his natural father, Kanai Lal Sen, as his guardian *ad litem*, contended that he was not a proper or necessary party to the suit, and a similar position was taken up by Katyayani, who admitted in the second paragraph of her written statement that, since the death of her husband, she and her infant daughter lived with, and had been maintained by, her mother-in-law, Mati Dasee, up to the month of August, 1890. On the 8th April, 1892, Mr. Justice Trevelyan made a preliminary decree in the suit. He dismissed the suit against the

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defendants other than Mati Dasee, that is, as against the two executor-defendants, the second adopted son and the widow of the first adopted son. He declared, however, that the plaintiffs, Kali Das and Bhola Nath, were entitled to an one-fourth share of the properties belonging to the estate of Rajballav Seal, and he directed enquiries upon three points, namely, *first*, as to the extent of the estate of the testator, *secondly*, as to the net income of the residuary estate for the three years antecedent to the institution of the suit, and, *thirdly*, as to what portion of the income had been paid to the plaintiff and what, if anything, remained due to them. We have found from an examination of the records that a fair copy of the judgment upon which this decree was based was never drawn up and signed by Mr. Justice Trevelyan, and the only record of it in existence is the entry in the Court Minute Book of the 4th April, 1892. This entry shows that the question of construction of the will was argued on behalf of the plaintiffs, while on behalf of Katyayani and Amulya Charan, who were represented by the same learned counsel, it was contended that they were not necessary parties. The Court thereupon delivered judgment: "Declaration that the sons (grandsons) of the testator are entitled to this share (?) of the testator, which is one-fourth share of the property. They are entitled to such share absolutely. That being so, they are entitled to a decree against Mati Dasee. As to Mati Dasee, there must be an enquiry as to what the estate of the testator consisted of at the time of his death and what the income of the residuary estate has been during the last three years, before the filing of the plaint, and what portion of the income has been paid to the plaintiffs and what remains due to them. Court is disposed to think that the suit ought to be dismissed as against Mr. Remfry and also dismissed as against Mr. Sales' clients (Amulya Charan and Katyayani Dāsee), but Court will consider that question and will also consider the question of costs." The question was, however, not further considered, and on the 8th April, 1892, although the suit was expressly dismissed as against the executor Bholanath, the only order made

as to Amulya and Katyayani was that they should receive their costs out of the estate. Subsequently, the decree we have mentioned was filed on the 13th February, 1894. The enquiries directed by the preliminary decree were made and the accounts taken. In due course, a report was submitted on the 31st January, 1896, which showed that, so far from anything being due by Mati Dasee to the plaintiffs, Rs. 217 was due to her by the plaintiffs, together with certain costs. On the 8th September, 1896, Mr. Justice Ameer Ali made a supplementary decree, which defined the properties comprised in the estate of Rajballav at the time of his death and declared that the plaintiffs had been over-paid. The decree, however, reserved to the plaintiffs liberty to apply to the Court for payment to them of an one-fourth share of the income of the estate. Directions were also given in the matter of costs, to which detailed reference is not needed for our present purposes. Subsequently, upon the death of Mati Dasee, Kanai Lal Sen, who claimed to be the sole executor under a will alleged to have been executed by her on the 10th February, 1899, applied to the Court on the 30th November, 1899, to be substituted on the record as her representative in interest. A Rule was issued, and the matter came to be heard by Mr. Justice Sale. On the 26th March, 1900, that learned Judge held that the preliminary decree had been made by Mr. Justice Trevelyan on the 8th April, 1892, and what must be deemed as the final decree, had been made by Mr. Justice Ameer Ali on the 8th September, 1896. He further observed that this latter decree was intended to be a final decree, except as to one matter which was held over; that is, that, except in so far as Mr. Justice Ameer Ali had reserved liberty to the plaintiffs to have the one-fourth share of the income of the estate paid to them, his decree must be taken to have finally disposed of the suit which could no longer be treated as a pending suit, except for the payment of costs and such sums as might be due to the plaintiffs on account of the income accrued due during the lifetime of Mati Dasee. The Court also observed that new matters had arisen owing to the death of Mati Dasee, and amongst these

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were the questions as to who was entitled to the estate and whether it might now be distributed among the persons entitled thereto, questions which must be dealt with, if at all, in a fresh suit supplemental or otherwise. In this view, Mr. Justice Sale discharged the Rule, and, so far as we have been able to gather from an examination of the entire records of that suit, no further proceedings have been taken in the matter up to the present stage.

The second litigation in respect of the estate of Rajballav Seal, which we have next to examine, was commenced on the 9th October, 1901, in the Court of the Subordinate Judge of the 24-Pergannahs by Amulya Charan Seal, the second adopted son, by his next friend and natural father, Kanai Lal Sen.

The first two defendants in this suit were Kali Das Sen and Bhola Nath Sen, and the third defendant was the sister of the then plaintiff, Katyayani Dasee, the widow of the first adopted son, Jogendra Nath. This suit is referred to in the present proceedings as Title Suit No. 127 of 1901, and it appears to have been re-numbered as No. 10 of 1902. In the plaint, the suit was described as one for construction of the will of Rajballav Seal, for possession of his estate, for partition and accounts, and it was valued at Rs. 10,500. The case for the plaintiff was that, as the second adopted son of Rajballav, he was entitled under the terms of his testamentary disposition to a three-fourths share of the estate left by him, and the first two defendants, the grandsons by the daughter, were entitled to the remaining one-fourth share of the estate. The plaintiff alleged that upon the death of Mati Dasee on the 27th September, 1899, the first two defendants took forcible possession of the entire estate, and that consequently he was entitled to have the will construed and to be placed in possession of his share of the estate. The first two defendants resisted the claim on the ground that the plaintiff had no title at all, that his adoption at a time when the widow of the first adopted son was still alive, was clearly void and ineffectual, and that consequently he was not entitled to obtain possession

of any portion of the estate of Rajballav Seal. The third defendant, Katyayani Dasee, the sister of the plaintiff, who, as appears from the evidence in the present litigation, at that time as now acted under the advice and guidance of her father, who himself was the next friend of his infant son, the plaintiff, filed a written statement in which she denied that the plaintiff had any interest in the estate of the testator, except possibly that attributable to a right of maintenance. She asserted that, as the widow of the first adopted son, Jogendra Nath, she was entitled to an undivided three-fourths share of the estate of Rajballav, which had vested in her husband, but had been wrongfully seized by the first two defendants. She prayed accordingly that an account might be taken of the estate as it existed at the time of the death of Mati Dasee, that the will of Rajballav might be construed, that the rights of all the parties might be ascertained and declared, and that a partition of the estate might be effected and possession given of the different shares to the parties found entitled thereto. She added, in conclusion, that, if the Court determined that she was not entitled to a definite share of the estate, her right to maintenance might be declared and made a charge thereon. The position, therefore, was that the plaintiff Amulya Charan and the third defendant Katyayani Dasee were agreed that the first two defendants, the grandsons of Rajballav, were not entitled to more than a fourth share of the estate; although nominally arrayed one against the other, they were in fact united against their common enemy, the Sens, and their joint prayer in substance was that the three-fourths share, which had been seized by the Sens, might be taken out of their hands and given over either to the plaintiff or to the third defendant. In fact, any other position was impossible, because the plaintiff and the third defendant were entirely in the hands of their father, Kanai Lal Sen; the object of the suit was not so much to settle any real controversy between the brother and the sister, who had, by reason respectively of his adoption and her marriage, become brother-in-law and sister-in-law, as to recover the three-fourths

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share of the estate from the hands of the Sens. That this was indubitably the true position, is clear from the admission made by Kanai Lal and Katyayani Dasee in the present litigation, that the arrangement between Amulya and Katyayani Dasee was that, whoever might be held by the Court to be entitled to the three-fourths share of the estate, upon recovery thereof, it would be equally divided between the brother and the sister. In truth the fight was between Kanai Lal Sen on the one hand, and Kali Das Sen and Bhola Nath Sen on the other. His object obviously was to recover the three-fourths share of the estate from the hands of these latter persons, and to have it equally divided between his own son and daughter. The Sens resisted the claim of the plaintiff, as we have already stated, on the ground that his adoption was invalid, because it had been made at a time when the widow of the first adopted son was alive.

A preliminary issue was consequently raised, namely, whether the plaintiff was validly adopted in view of the fact that the first adopted son had left a widow and a daughter. On the 5th January, 1903, the Subordinate Judge held that, upon the death of the first adopted son, leaving a widow and a daughter, her authority to take a second son in adoption came to an end, and that, consequently, the adoption of the plaintiff, Amulya, was wholly inoperative, and he was in no way interested in the estate or entitled to maintain a suit in respect thereof. In this view, the Subordinate Judge dismissed the suit. On the 9th February, 1903, Amulya Charan appealed to this Court against the decree of dismissal, and the respondents to the appeal were the three defendants, namely, the two Sens and Katyayani Dasee. On the 28th March, 1905, the appeal was dismissed by this Court: *Amulya Charan Seal v. Kali Das Sen* (1). The learned Judges who heard the appeal held that the adoption of the plaintiff was not valid, because the authority conferred upon Mati Dasee by her husband, to adopt a second son terminated when the first adopted son died leaving



a widow and a daughter. The learned Judges, however, went on to examine another argument advanced on behalf of the appellant, namely, that upon a true construction of the will of Rajballav, his estate did not vest in Jogendra Nath before his death, that the widow of the latter, Katayani, did not inherit any property from her husband, and that such share of the property remained in Mati Dasee, with the result that she was competent to exercise the power vested in her as regards the adoption of a second son upon the death of the first adopted son before attaining the age of 20 years. The Court overruled this contention in the view that, as the scheme of the will was that the estate should not vest in any person until the death of Mati Dasee, there was an intestacy as to the *corpus*, so that the estate vested by law in the legal heir, Jogendra, and subsequently passed by succession to his widow, Katayani Dasee. It will be observed that this view was not only sufficient to defeat the claim of the plaintiff Amulya, but also negatived the claim of the Sens, who, upon the common case of the plaintiff Amulya and Katayani Dasee, were entitled to an one-fourth share of the estate. In other words, upon this view, Katayani Dasee would be entitled, not to a three-fourths share as claimed by her, but to the whole of the estate. To put the matter in another way, this view not merely led to the dismissal of the suit of Amulya, but rendered inevitable a controversy between Kali Das and Bhola Nath on the one hand, and Katayani on the other. The result of the decision, as we shall see hereafter, did affect the conduct of the parties in a subsequent litigation. For the present, we need mention only that the Court affirmed the decree of the Subordinate Judge and dismissed the appeal. Amulya died shortly after in April, 1905.

The third litigation, the details of which now require careful consideration and examination, had been commenced by Katayani Dasee on the 13th January, 1903, in the Court of the Subordinate Judge of the 24-Pergannahs. It is important to observe the significance of this date. The Subordinate Judge, who tried the suit of Amulya Charan, had, as we have

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already stated, dismissed it on the 5th January, 1903. The view taken by him was that the adoption of Amulya was invalid, so that Katyayani Dasee was entitled to a three-fourths share as alleged by her, and Kali Das and Bhola Nath to the remaining one-fourth share. Although an appeal was preferred against this decree on behalf of Amulya Charan by his father, Kanai Lal Sen, the latter possibly anticipated considerable difficulty in the way of success, and consequently, within eight days of the dismissal of the suit of Amulya, he had another suit instituted by his daughter, Katyayani Dasee, for recovery of the estate. That he was the leading spirit in all these litigations, whether fought in the name of Amulya Charan or in that of Katyayani, is abundantly clear upon the evidence, and indeed, has not been seriously disputed before us. The parties defendants to the suit of Katyayani Dasee were Kali Das and Bhola Nath, the two grandsons of Rajballav, Amulya Charan Seal, the natural brother of the then plaintiff and second adopted son of Mati Dasee, and Barada Kanta Sarkar, an officer of the Court, who had been appointed receiver of the estate in the suit of Amulya. It is necessary to observe that the suit was valued at Rs. 2,100, whereas the suit of Amulya Charan had been valued at Rs. 10,500, and court-fees were paid upon the smaller valuation, so that, whereas in the suit of Amulya, court-fees had been paid upon the plaint to the extent of Rs. 490, court-fees to the extent of Rs. 130 only were paid upon the plaint filed by Katyayani Dasee, although the subject-matters of the two litigations were identical.

The plaint in the suit of Katyayani Dasee asked for construction of the will of Rajballav, for declaration of title, for recovery of possession, for partition and accounts, and for incidental reliefs. Katyayani Dasee alleged that she was entitled, as the widow of Jogendra Nath, to a three-fourths share of the estate of Rajballav Seal, that the defendants Kali Das and Bhola Nath were entitled to a fourth share, and that consequently she was entitled to recover possession of a three-fourths share of the whole estate, which at the time was in the custody of the receiver. The first two defendants, Kali Das

and Bhola Nath, resisted the claim on various grounds, some of them obviously idle and futile. They denied the genuineness of the will of Rajballav; they questioned the *factum* and validity of the adoption of Jogendra Nath, and contended that neither Jogendra nor the plaintiff, as his widow, was entitled to any portion of the estate. The third defendant, Amulya Charan, filed a written statement, through his natural father and guardian *ad litem*, Kanai Lal Sen, in which he urged that, upon a true construction of the will of Rajballav, the plaintiff had taken no interest in his estate, that his own adoption was valid and operative, that, as such second adopted son, he was entitled to a three-fourths of the estate, that he might be awarded such share, and that, if the Court should decide against him upon the question of title, provision might be made for his maintenance. The true position, therefore, in so far as Katyayani Dasee and Amulya Charan were concerned, was precisely identical with what it was in the suit of Amulya Charan. The brother and the sister were united against their common foe, the Sens, in whose favour they conceded an one-fourth share of the estate. As between themselves, Katyayani Dasee urged that she was entitled to a three-fourths share, while Amulya controverted the claim mainly on the strength of the appeal which had already been preferred by him to this Court against the adverse decision in his suit. This obviously was the only position possible, for, as we have already explained, it was Kanai Lal Sen who managed the litigation on behalf of both the son and the daughter, who were at the time nominally arrayed against each other, but were really united, as is now abundantly clear; for there was a secret understanding between them that, whoever might succeed, the estate recovered from the Sens, that is, the three-fourths share, would be divided equally between themselves. The Subordinate Judge, upon these pleadings, originally raised nine issues. The first issue covered the question of limitation, the second related to the genuineness of the will of Rajballav, and the third to the validity of the adoption of Jogendra Nath. The

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fifth issue raised the question of the true construction of the will, the fourth expressly raised a question included in the fifth, namely, whether the husband of Katyayani Dasee was entitled to a three-fourths share of the estate; the sixth repeated the same question in a slightly varied form; the seventh and the eighth issues related to the question of the extent of the estate of Rajballav at the time of the death of Mati Dasee and the liability of the Sens, defendants, to account therefor; the ninth raised the question whether Amulya Charan had any interest in the estate. These issues were framed on the 17th June, 1903, but, as the suit did not come on for trial till after the decision of the appeal preferred by Amulya Charan to this Court, three additional issues were raised on the 23rd November, 1905. These issues were rendered necessary, because after the decision of this Court in the appeal of Amulya Charan, Katyayani Dasee obtained an amendment of the plaint in her suit. She, or rather her father, Kanai Lal Sen, was not slow to appreciate the effect and to seek the benefit of the opinion expressed by this Court that, upon a true construction of the will of Rajballav, there was an intestacy as to the *corpus* which had vested in Jogendra Nath and had subsequently passed by succession to Katyayani Dasee to the total exclusion of the Sens. Consequently, on the 6th September, 1905, she had her plaint amended. She raised the value of her suit from Rs. 2,100 to Rs. 2,800 and paid additional court-fees in respect of the increased amount. She prayed now for a declaration that she was entitled to the whole of the estate to the complete exclusion of the Sens. In fact, she put forward her claim in the alternative, and sought for a declaration that she was entitled either to the whole or a three-fourths share of the estate. It is worthy of remark that at this time Amulya Charan was dead, so that there was no longer even any semblance of a conflict of interest between the brother and the sister. Kanai Lal Sen, who had so long strenuously fought, sometimes through his son, at others through his daughter, to recover the three-fourths share of the estate, obviously deemed it imprudent to allow this opportu-

nity to pass without an effort to secure the whole of the estate, in view of the decision of the High Court adverse to his son in the appeal preferred by him. Consequently, after the amendment of the plaint, when the Sens found that even the one-fourth share so long uniformly conceded in their favour, was in jeopardy, three additional issues were raised. The tenth and the eleventh issues raised the question whether the decision of this Court in the appeal of Amulya Charan relating to the *corpus* of the estate could in any way bind them; and the twelfth issue raised the question whether the plaintiff Katayani Dasee could ask for construction of the will after the decision of this Court in the suit commenced by the Sens in 1890, in which she was a defendant. It is necessary to mention, at this stage, an incident which has an important bearing upon the present litigation. As we have already stated, Amulya Charan died in April, 1905, shortly after the dismissal of his appeal by this Court. At that time he was the third defendant in the suit commenced by his sister Katayani Dasee. On the 27th July, 1905, Katayani Dasee made an application to the Court to substitute on the record his natural father, Kanai Lal Sen, as his representative in interest. In this application it was alleged that, as the High Court, in the appeal of Amulya Charan, had held that his adoption was invalid, because the power of Mati Dasee to take a second son in adoption had been exhausted upon the death of Jogendra Nath leaving a widow and a daughter, the proper person to be brought on the record was his natural father. On the 7th August, 1905, the Court made the order for substitution. It was overlooked that, if the decision of this Court in the appeal of Amulya Charan was accepted as correct, he was in no sense a necessary party to the suit of Katayani Dasee, because he could not claim any interest in the estate of Rajballav as his second adopted son, and that, in this view, his natural father, Kanai Lal, could have no concern with that litigation. It has not been disclosed on behalf of Katayani Dasee, or of Kanai Lal who admittedly guided Katayani Dasee in her suit, under what advice or upon what theory this application was made. But apparently there

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was a change of front as soon as the notice of the suit was served upon Kanai Lal, because we find that on the 6th September, 1905, Kanai Lal put in a petition of objection, in which he asserted that, as Amulya had been validly adopted by Mati Dasee, he, as natural father of Amulya, could not possibly be his representative in interest so far as the estate of Rajballav Seal was concerned. It has not been explained why an application of this character was put in by Kanai Lal Sen. The position would have been perfectly intelligible, if we did not know, as we do know now from the evidence of Katyayani Dasee and Kanai Lal, that Katyayani Dasee acted under the advice and guidance of her father in the matter of that litigation. It is conceivable that Kanai Lal who was the principal actor in both the litigations of Amulya and Katyayani, thought it prudent to present before the Court both the possible views, one, by the application of his daughter, the other in his own petition of objection. Whatever the motives of the parties might have been, we find that on the same day, the 6th September, 1905, an application was put in on behalf of Katyayani Dasee, in which she stated that her first application for substitution, made on the 27th July, 1905, was erroneous, that her father could not be the legal representative of Amulya Charan, and that if he had left any heirs, they were the Sen defendants. Upon these allegations, she prayed that the name of her father, Kanai Lal Sen, might be removed from the record. The result was that, on that very day, the Court recorded an order, by which the name of Kanai Lal Sen was struck out, and it was declared that the cause of action survived against the two Sen defendants, so that none else was needed to be substituted in place of Amulya Charan. The position, therefore, was that Kanai Lal Sen, who, upon the application of his daughter, made probably at his own instance, had been brought on the record, was excluded from the suit upon his own objection and with the assent of his daughter. We may incidentally note here that on the 6th September, 1905, another order for substitution was made in the suit; as the first defendant, Kali Das Sen, had died, mean-



while, his son, Bankim Chunder Sen, was brought on the record as his legal representative. It is perfectly clear, therefore, that after the 6th September, 1905, the suit proceeded between Katayani Dasee on the one hand as plaintiff and Bankim and Bhola Nath Sen as defendants on the other. The receiver, Barada Kanta Sarkar, who had been placed in charge of the estate in the suit of Amulya Charan, and was still in possession, continued to be a party on the record. He was, however, in the position of a mere stake-holder, and was not really concerned with the controversy between Katayani Dasee and the Sen defendants. On the 21st December, 1905, the Subordinate Judge gave his decision in this suit. With regard to the first two issues, he stated that the plea of limitation was not urged by the defendants and the question of genuineness of the will was waived by them, because probate had been granted so far back as 1870, and the Sens quite as much as the plaintiff claimed under that will. As regards the validity of the adoption of Jogendra Nath by Mati Dasee, he held that it had been amply established, and observed that the deed of adoption and the ceremonies thereunder were duly proved. In so far as the question raised in the twelfth issue was concerned, namely, whether the construction of the will was *res judicata* by reason of the decision of this Court in the suit commenced by the Sens in 1890, the Subordinate Judge held that the matter was open for consideration as that suit had been dismissed against the plaintiff Katayani Dasee. The Subordinate Judge then observed that the ninth issue had become unnecessary by reason of the death of Amulya Charan. As regards the remaining issues, the Subordinate Judge adopted the view taken by the High Court in the appeal of Amulya Charan, and came to the conclusion that there was an intestacy as to the *corpus* which vested in Jogendra Nath, and upon his death passed to his widow Katayani Dasee. In this view, the Subordinate Judge allowed the claim in respect of the whole estate. A decree was drawn up in accordance with his judgment on the 21st December, 1905, and was signed by the Subordinate Judge on the 17th January,

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1906. The original decree, which is on the record of the suit, shows on the face of it that the parties were Katyayani Dasee as the plaintiff, Bankim Chandra Sen substituted in place of Kali Das Sen as the first defendant, Bhola Nath Sen as the second defendant, and Barada Kanta Sarkar as the fourth defendant. In the place of the third defendant, Amulya Charan, the following entry was made: "As Amulya Charan has died, Babu Kanai Lal Sen was substituted in his place, but subsequently he was struck off from the category of defendants under order dated 6th September, 1905." The Sens obtained a copy of the judgment and decree, and preferred an appeal on the 16th February, 1906. They chose the Court of the District Judge as the *forum* of their appeal, because the suit was valued at Rs. 2,800, and paid Rs. 165 as *ad valorem* court-fees on the memorandum. In other words, whereas in the suit of Amulya Charan, value at Rs. 10,500, the appeal was brought to this Court, in the suit of Katyayani Dasee, the appeal was taken to the Court of the District Judge, although the subject-matter of the two litigations was initially identical, and in the suit of Katyayani Dasee, by amendment of the plaint, the claim was made ultimately to include the whole of the estate instead of the three-fourths share only which Amulya Charan had sought to recover. In the memorandum of appeal presented by the Sens, the original of which is before us, the appellants are described as the first and second defendants. The respondents are described in two sets, first the plaintiff-respondent Katyayani Dasee, and next the defendants-respondents, namely Amulya Charan Seal and upon his death Kanai Lal Sen, and the receiver Barada Kanta Sarkar. An examination of the original makes it fairly clear that the name of Amulya Charan Seal was written first, and then the words were interpolated "Upon his death in his place Kanai Lal Sen, resident of Cold Stream Cottage, Darjeeling." It is superfluous to observe that this memorandum of appeal, as drawn up, was manifestly erroneous. Kanai Lal Sen was not a party to the suit in the Court below; he was not a party to the decree made by the Subordinate Judge. This fact was made patent on the face of that

decree, yet the Sen defendants-appellants had the hardihood to make Kanai Lal Sen a party respondent to the appeal. The extraordinary laxity with which business was conducted in the Court of the District Judge, becomes manifest when we find that this was not discovered in the office after the memorandum had been filed. It has been suggested by the learned vakil for the appellant that the matter was not brought to the notice of the Judge by the officers of the Court, not because of their negligence, but for very different reasons. It is not necessary for us, however, to express any opinion as to the manner in which this happened. It is sufficient to hold that the appellants brought on the record Kanai Lal Sen without any authority, and that this circumstance never came to the notice of the Judge. Notices of the appeal were served in due course upon the parties respondents. Katyayani Dasee filed a memorandum of cross-objections under section 561 of the Civil Procedure Code of 1882. Kanai Lal Sen also entered appearance, and it is worthy of note that he took no objection whatever that he had been made a party to the appeal. This is remarkable when we remember that he had strenuously and successfully contended in the Original Court that he could not be made a party to the suit as the legal representative of his deceased son, Amulya Charan. It is not necessary at this stage to consider what his motives were and why he quietly acquiesced when he found that he had been made a party respondent to the appeal. The hearing was adjourned from time to time, and on the 1st November, 1906, an entry was made in the order sheet that, as there was a talk of compromise between the parties, the case was adjourned for one month. We now know from the evidence on the record that negotiations for compromise had commenced long before the appeal was preferred, in fact, during the pendency of the suit in the Original Court. On the 9th January, 1907, upon the application of the Sen defendants-appellants and with the consent of the respondents one Shib Krishna Das was added as a party to the appeal, upon the allegation that he had taken a mortgage from the Sens in respect of the disputed property so far back as the 25th Sep-

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tember, 1903. On the same date the learned Judge recorded an order "that the parties have now compromised their disputes and put in a petition," in terms of which he directed the decree in appeal to be drawn up. He further ordered the case to be remanded to the lower Court to have the decree carried out. This petition of compromise, which is the direct origin of the present litigation, was presented on behalf of the Sens, defendants-appellants, Shib Krishna Das, mortgagee from them, the added respondent, Kanai Lal Sen, whose name had been placed on the record of the appeal without the leave of the Court, and his daughter, Katyayani Dasee, the plaintiff-respondent. The terms of compromise were as follows: The decree of the first Court, which gave the entire estate of Rajballav Seal to the plaintiff Katyayani, was to be discharged. In lieu thereof, Katyayani was to obtain an absolute estate of inheritance in six-sixteenths share of the estate. The respondent Kanai Lal Sen, the father of the plaintiff, was likewise to get another six-sixteenths share as the equivalent of his advances of money and trouble for the series of litigations relating to the estate and ending with the compromise. The remaining four-sixteenths share was to be taken by the Sens, defendants, Bankim Chandra and Bhola Nath, in equal halves. The four-sixteenths share, thus given to the Sens, was to remain subject to the mortgage executed in favour of Shib Krishna Das on the 25th September, 1903. The mortgagee abandoned all claim upon the twelveth-sixteenths divided between Katyayani Dasee and Kanai Lal. The shares of the parties were to be partitioned amongst the two Sens, Bankim Chandra and Bhola Nath, Katyayani, and Kanai Lal Sen. A decree was drawn up on the basis of this petition of compromise on the 24th January, 1907, and the schedule to the decree described the subject-matter of the litigation as comprising several items of property, inclusive of forty-two bigahs of land in the suburbs of this city, upon which stood a market and various buildings. The parties to this petition of compromise and their legal advisers, no doubt imagined at the time that all disputes had terminated, and Kanai Lal Sen must have satisfied himself that he had at last suc-

ceeded in his effort, extended over many years, to seize the estate of Rajballav Seal, of which he took, under the petition of compromise, a six-sixteenths share for himself and secured another six-sixteenths for his widowed daughter. The troubles of the parties, however, were by no means near the end, for on the 23rd April, 1907, Rajlakshmi Dasee, the daughter of Katyayani, commenced the present litigation for declaration that this consent-decree was in no way binding upon her, and that it could not possibly affect her position as the reversionary heir of Jogendra Nath; she also prayed in the alternative that, if the Court found any sum was advanced by Kanai Lal Sen for the benefit of the estate, such sum might be declared a debt due by the estate to Kanai Lal. She valued the suit at two lacs of rupees, which she asserted was the true value of the subject-matter of the litigation. She joined as defendants six persons: first, her mother Katyayani Dasee; second and third, Bankim Chandra Sen and Bhola Nath Sen; fourth, her maternal grandfather, Kanai Lal Sen; fifth, Shib Krishna Das, the mortgagee from the two Sens; and sixth, the receiver, Barada Kanta Sarkar. The defendants, Katyayani Dasee, Bankim Chandra Sen, Kanai Lal Sen and Shib Krishna Das all resisted the claim of the plaintiff, but the principal contesting defendants were Katyayani Dasee and her father, Kanai Lal Sen, who maintained that the consent-decree was valid and operative, and was beneficial to the estate of Jogendra Nath. Kanai Lal, in paragraph 26 of his written statement, also suggested that the estate of Rajballav had never vested in Jogendra Nath or Katyayani, and that consequently the plaintiff Rajlakshmi, as the daughter of Jogendra and his reversionary heir, was not entitled to maintain any declaratory suit in respect thereof. Upon the pleadings six issues were raised by the Subordinate Judge: the first raised the question of court-fees, with which we are not concerned at this stage; the second raised the question whether the plaintiff had any cause of action; the third covered the question of the effect of section 42 of the Specific Relief Act, which, it was apparently sug-

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gested, was a bar to the maintainability of the suit; the fourth and fifth issues raised the two substantial questions in the litigation, namely, what was the nature of the interest of Katayani in the property in suit, and whether the consent-decree of the 9th January, 1907, was binding upon the plaintiff; the sixth issue merely raised the question whether the plaintiff was entitled to all or any of the declarations she sought in the plaint. Upon the first three issues the Subordinate Judge came to a decision in favour of the plaintiff Rajlakshmi Dasee. He held that the plaint was sufficiently stamped as a plaint in a declaratory suit, that the plaintiff had a cause of action, and that section 42 was no bar in view of the decision of this Court in the case of *Srinibash Das v. Monmohini Dasi* (1), in which it was ruled that a Hindu daughter was entitled during the lifetime of her mother to maintain a suit for the construction of the will of her deceased father and for declarations incidental thereto, specially where the mother had done acts which might ultimately prove prejudicial to the interest of the daughter. Upon the fourth issue, namely, the binding character of the consent-decree of the 9th January, 1907, the Subordinate Judge held that Katayani Dasee had entered into the compromise with caution and deliberation, and that undue influence or coercion had not been exercised upon her. He further found upon the evidence that Kanai Lal Sen had spent Rs. 8,000 for the maintenance of his daughter and her child, for the marriage expenses of his grandchild, and for litigation expenses to recover the estate, for the benefit of his daughter, from the hands of the Sens who had unlawfully seized it. In this view, as also in view of the circumstance that there was a dispute as to the construction of the will, the Subordinate Judge came to the conclusion that the decree was binding upon the plaintiff, in so far as it gave to Kanai Lal Sen a six-sixteenths share of the estate; but he held, that the decree could not be supported, in so far as it gave an absolute estate of inheritance to Katayani Dasee, who was entitled to no more than the interest of a Hindu

(1) (1906) 3 C. L. J. 224.



widow, in the estate of her husband. The Subordinate Judge accordingly made a decree, by which he declared that Katyayani Dasee could not acquire any right larger than that of a Hindu widow in the six-sixteenths share of the property obtained by her under the terms of the consent-decree. The plaintiff has now appealed to this Court, and on her behalf the decision of the Subordinate Judge has been assailed on three grounds, namely, *first*, that the consent-decree is inoperative, in so far as the plaintiff is concerned, inasmuch as it was made by the Court of the District Judge, which had no jurisdiction over the subject-matter of the litigation, was between parties one of whom, Kanai Lal Sen, was made a party to the appeal without the knowledge or authority of the Court, and, so far as it was in favour of Kanai Lal, went beyond the scope of the suit; *secondly*, that the plaintiff is not bound by the consent-decree, because it was not made after full contest in a *bonâ fide* litigation; and *thirdly*, that the compromise on which the decree was based was in itself unjust and improvident, and in any view, even upon the assumption that Kanai Lal Sen had spent some money to enable his daughter to recover from the Sens the estate of her husband, there was no justification for an arrangement by which he had been given a six-sixteenths share of the estate, which is worth at least Rs. 50,000. The first and second of these positions have not been seriously controverted on behalf of Kanai Lal Sen and Katyayani Dasee; but it has been argued on their behalf that, upon a true construction of the will of Rajballav, Jogendra Nath did not take such interest in his estate as could pass by succession to his widow, Katyayani Dasee, and subsequently to the plaintiff and her children as the ultimate reversioners; and that, from this point of view, the plaintiff is not entitled to maintain the present action. It has also been contended, though somewhat faintly, on behalf of Katyayani that the decree of the Court below, in so far as it declares that she is entitled to the interest of a Hindu widow in the estate taken by her under the consent-decree, ought not to be maintained. The appeal has not been contested by the Sens defendants, who have not entered ap-

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pearance, though served with notice; but, on behalf of the representatives of their mortgagee, it has been argued that either under the consent-decree or under the will of Rajballav, the mortgagers are entitled to an one-fourth share of the estate against which the mortgage may be enforced. The position taken up by the mortgagee, therefore, in substance, is that it is immaterial for his purposes what happens to the consent-decree, as he can always proceed against the one-fourth share of the estate which belonged to the Sens.

In so far as the first point taken on behalf of the appellant is concerned, it has been pointed out that, in view of the true value of the subject-matter of the litigation, the District Judge had no jurisdiction to entertain the appeal which ought to have been preferred to this Court. The facts upon this part of the case cannot possibly be doubted, and indeed have not formed the subject of controversy before us. As we have already stated, the suit of Katyayani Dasee, in which the consent-decree was ultimately made, was originally valued at Rs. 2,100, and was instituted in the Court of the Subordinate Judge. In so far as the original Court was concerned, it was obviously immaterial for purposes of jurisdiction what value was put upon the subject-matter of the litigation, because if the value exceeded Rs. 2,000, it was properly instituted in the Court of the Subordinate Judge. But the question of valuation was of paramount importance for the determination of the *forum* of appeal. That the under-valuation was deliberate admits of no doubt or dispute. In the suit of Amulya Charan, which had been instituted by Kanai Lal Sen, on his behalf in 1901, the value of the subject-matter then in dispute, that is, a three-fourths share of the estate of Rajballav Seal, was stated to be Rs. 10,500. This statement itself, as we shall presently see, was a gross under-valuation; but, from the point of view of jurisdiction, either of the Original Court or of the Court of Appeal, it was immaterial, because the suit was tried by the Subordinate Judge, and heard on appeal by this Court; and if the parties had so chosen, in so far as the value of the subject-matter was concerned, they would have been entitled to take

the matter to His Majesty in Council. In the suit of Katyayani, however, instituted in 1903, the very same share in dispute was deliberately valued at Rs. 2,100. It has, indeed, been suggested that there was a difference between the suits of Amulya Charan and Katyayani Dasee, because, if successful, the former would take an absolute interest, while the latter would take the qualified interest of a Hindu widow. But the suggested distinction, even if it is assumed to be well-founded, does not explain the difference in valuation, for in the cross-objections filed by Katyayani in this Court, the life-interest is valued at one-third of the absolute interest. That the suit was grossly under-valued, admits of no controversy, and indeed, has not been disputed before us. Whether this was done with a view to defraud the State in the matter of court-fees or from any ulterior motive, we are not in a position to determine. The true value of the property, as Kanai Lal Sen himself admits in his deposition in the present case, was more than Rs. 95,000. We have before us the papers of the partition effected by the Court of the Subordinate Judge in the suit of Katyayani Dasee on remand after the consent-decree. We find from these papers that the properties were valued by a qualified engineer at Rs. 1,37,058, and this valuation was accepted by all the parties, including Katyayani Dasee and Kanai Lal Sen, without any demur or dispute. We have it, therefore, that the three-fourths share originally included in the suit of Katyayani Dasee, the true value of which is more than Rs. 1,00,000, was deliberately valued in the plaint at Rs. 2,100. The result was that the plaintiff defrauded the State of the fee payable to a much larger extent than had been done in the case of Amulya Charan. The proper fee payable was Rs. 1,450. The amount paid upon the plaint in the suit of Amulya Charan was Rs. 490, and the amount paid by Katyayani Dasee upon her plaint was Rs. 130 only. But what was much worse in the case of the suit of Katyayani Dasee, was that the jurisdiction of the High Court as the Court of Appeal was ousted. The District Judge could take cognizance of the appeal only if the value of the subject-matter of the litigation did not exceed Rs. 5,000. As we have

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already stated, the value of the subject-matter was more than Rs. 1,37,000, because Katyayani Dasee at a later stage had her plaint amended so as to include the whole estate. It is clear, therefore, that the consent-decree made by the District Judge was made wholly without jurisdiction. We are not now called upon to consider what the effect of such lack of jurisdiction would be upon the decree, in so far as the parties thereto were concerned. It is manifest that so far as a stranger to the decree is concerned, who is interested in the property affected by the decree, he can obviously ask for a declaration that the decree is a nullity, because made by a Court which had no jurisdiction over the subject-matter of the litigation. It is an elementary principle of law that, if a Court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they are presented: *Ferguson v. Mahon* (1), *Briscoe v. Stephens* (2), *Buchanan v. Rucker* (3), *Attorney-General v. Hotham* (4), *Perkin v. Proctor* (5), *Ex parte Kinning* (6), *Brown v. Compton* (7). If a Court has no jurisdiction, its judgment is not merely voidable, but void, and it is wholly unimportant how precisely certain and technically correct its proceedings and decisions may have been; if it has no power to hear and determine the cause, its authority is wholly usurped and its judgments and orders are the exercise of arbitrary power under the forms, but without the sanction of the law. These principles apply, not only to Original Courts, but also to Courts of Appeal. Jurisdiction over the subject-matter, whether in the Court of first instance or in the Appellate Court, is given only by law, and cannot be conferred by consent of parties. Accordingly where an Appellate Court does not possess jurisdic-

- (1) (1839) 11 A. & E. 179;  
52 R. R. 301.  
(2) (1824) 2 Bing. 213;  
27 R. R. 597.  
(3) (1808) 9 East. 192;  
9 R. R. 531.

- (4) (1823) T. & R. 209;  
24 R. R. 21.  
(5) (1768) 2 Wilson 382.  
(6) (1847) 4 C. B. 507, 525.  
(7) (1800) 8 T. R. 424.

tion to review the action of the Court below, jurisdiction cannot be conferred upon it by consent of the parties; and any waiver on their part cannot make up for the lack or defect of jurisdiction: *Gurdeo Singh v. Chandrikah Singh* (1), *Baij Nath Singh v. Gajraj Singh* (2), *Gooroo Persad Roy v. Juggobundhoo Mozoomdar* (3), *Golab Sao v. Chowdhury Madho Lal* (4), *Legdard v. Bull* (5), *Minakshi Naidu v. Subramanya Sastri* (6), *Lawrence v. Wilcock* (7), *The Queen v. The Judge of the County Court of Shropshire* (8), *In re Aylmer* (9). These cases lay down the doctrine that, where no jurisdiction exists, no action on the part of the plaintiff, no inaction on the part of the defendant, can invest the Court with any of the elements of power or of vitality, so as to convert the proceeding before it into a proper judicial process. If a Court assumes to act where it has no jurisdiction, its adjudications are all utterly void and have no effect either as an estoppel or otherwise. From this point of view, the consent-decree is entirely unavailing for want of jurisdiction, and consequently neither binds nor bars the plaintiff: *Kalka Parshad v. Kanhaya Singh* (10). The case before us is, indeed, really much stronger than any to which we have referred, because here the plaintiff was not a party to the proceedings in which the consent-decree was made, and she, at any rate, did not contribute by her silence or acquiescence to the usurpation of jurisdiction by the District Judge. The whole proceeding, in fact, was a fraud upon the jurisdiction of this Court, which alone was competent to hear an appeal in a controversy relating to the subject-matter of that litigation. It is further worthy of remark that this deliberate under-valuation, by means of which the appeal was taken to the Court of the District Judge, has been productive of the extraordinary result that Kanai Lal Sen,

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(1) (1907) I. L. R. 36 Calc. 193.

(2) (1910) 7 All. L. J. R. 675.

(3) (1862) W. R. F. B. 15.

(4) (1905) 9 C. W. N. 956.

(5) (1886) I. L. R. 9 All. 191;  
 L. R. 13 I. A. 134.

(6) (1887) I. L. R. 11 Mad. 26;  
 L. R. 14 I. A. 160.

(7) (1840) 11 A. & E. 941.

(8) (1887) 20 Q. B. D. 242, 248.

(9) (1887) 20 Q. B. D. 258, 262.

(10) (1875) 7 N. W. P. 99.

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without the leave or knowledge of the Court, was added as a party to the appeal. As we have already explained at full length, Kanai Lal Sen was sought to be added as a defendant in place of Amulya Charan Seal upon the death of the latter; he resisted, and his objection prevailed. A note was made on the record that his name, which had been provisionally substituted, was removed. This fact was also expressly stated on the face of the decree. Yet the Sens, when they preferred an appeal to the District Judge, added him as a party respondent. In their memorandum of appeal they described Kanai Lal Sen as if he had been a party in the Court below; and they attached a copy of the decree, which showed, on the face of it, that that was not so. Matters were, however, at the time so carelessly conducted in the Court of the District Judge that this circumstance escaped the notice of the officers of the Court; and Kanai Lal Sen entered appearance in the appeal, though he had protested in the Court below that he was in no sense a necessary party to the litigation. One circumstance is quite clear; if the appeal had been preferred to this Court, such a contingency would have been impossible. Memorandums of appeal presented to this Court are so minutely scrutinised before they are registered that any attempt of this character to add as a party respondent to an appeal a person who was not a party in the Original Court, could not possibly have escaped detection. However, by reason of the laxity of procedure in the Court of the District Judge, Kanai Lal was afforded the opportunity to enter appearance as a party respondent in the appeal. Why he acquiesced in the action of the Sens in making him a party to the appeal, can only be a matter for speculation. It was suggested in the Court below, and the suggestion has been repeated here, that the Sens made Kanai Lal a party to the appeal, because they wanted to have a substantial man on the record, against whom they might proceed for recovery of costs in the event of ultimate success. But it is hardly conceivable that the Sens or their legal advisers could ever have entertained an idea that a person could, at the appellate stage, be made responsible for



costs, though his name had been placed on the record without the leave or knowledge of the Court. Besides, how did the Sens foresee that Kanai Lal would take no exception to the course adopted by them and allow himself to be entangled in the litigation? On the other hand, it has been suggested by the learned vakil for the appellant that this was a device adopted by all the parties to have a consent-decree under which Kanai Lal might be awarded a substantial share of the estate. This suggestion is very likely well-founded, because the evidence makes it clear that negotiations for compromise were in progress even before the decree was made by the Original Court. The undoubted fact that the Sens made Kanai Lal a party who acquiesced in such action contrary to his attitude in the Court of first instance, is unquestionably a matter for just comment. But whatever the motive might have been for the strange procedure, we know the result of it. A consent-decree was made between the parties, by which Kanai Lal was awarded a substantial share of the estate, though he was not a party to the suit nor a party to the appeal, and though possibly the Court was not even aware of this circumstance. The outstanding features of the case, therefore, are, first, that by reason of a deliberate under-valuation, the appeal was taken to a Court which had no jurisdiction over the subject-matter of the litigation as a Court of Appeal, and the jurisdiction of the High Court was thus ousted. Secondly, that by reason of the laxity of proceedings in the Court of the District Judge, Kanai Lal Sen was irregularly brought on the record without any order of the Court, and a consent-decree was thus made between the parties to the suit and a stranger whose name ought not to have been placed on the memorandum of appeal. It is manifest, in our opinion, that a consent-decree made under these circumstances cannot be deemed a valid and operative decree binding upon the estate in the hands of the reversionary heir. On this ground alone the plaintiff is entitled to a declaration, that the decree is not operative as against her. We may add that the learned vakil for the appellant further contended that the consent-decree

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was also vitiated by the circumstance that it went beyond the scope of the suit, and was consequently in contravention of section 375 of the Code of 1882. That section provides that, in the event of a lawful agreement or compromise of a suit, the Court shall pass a decree in accordance therewith so far as it relates to the suit. Now the matter in controversy in the suit was the question of title to the estate of Rajballav Seal, had it vested in his adopted son, Jogendra Nath, in whole or in part, and passed by succession to Katyayani, the widow of Jogendra Nath, or had it vested, in whole or in part, in the grandsons by his daughter, the two Sens. Kanai Lal Sen had no claim against the estate of Rajballav Seal. He might be imagined to have some claim against his daughter, whom he had maintained and had assisted to recover the estate of her husband. Consequently, the claim of Kanai Lal Sen against his daughter could not, by any possibility, be treated as part of the matter in controversy in the suit of Katyayani. From this point of view, therefore, any decree in favour of Kanai Lal Sen would be beyond the scope of the suit, a position which is considerably strengthened by the undoubted fact that Kanai Lal in the Original Court successfully maintained that he was in no sense a necessary party. Under these circumstances, we must hold that the consent-decree is not binding upon the plaintiff, and she is entitled to a declaration to that effect.

The second ground urged on behalf of the appellant is, in our opinion, equally well-founded. It has been contended on behalf of the plaintiff that the consent-decree, made as it was between her mother, a Hindu widow, with a qualified interest in the estate of her husband, and other persons who claimed title in that property, is not binding upon the appellant as the reversionary heir to the estate of her father. No serious effort has been made on behalf of the defendants-respondents to controvert this position, and, in view of the authorities, to which we shall presently refer, the ground urged by the appellant must be deemed unassailable. In the case of *Imrit Konwur v. Roop Narain Singh* (1), their lordships of the Judicial Com-

mittee laid down that "the daughters could not be bound up by a compromise made by the widow *under any circumstances.*" No doubt in that case the widow by the compromise made good terms for herself in complete disregard of the interest of her daughter, who was the reversionary heir.

The decision of the Judicial Committee, however, was not based on any such narrow ground. That this is the true view of the decision of their Lordships is clear from the case of *Sheo Narain Singh v. Khurgo Koerry* (2), in which a consent-decree based on a compromise made by a Hindu widow was held inoperative against the reversioners, who claimed the estate after the death of the widow. Again, in the case of *Sant Kumar v. Deo Saran* (3), Mr. Justice Mahmood held that the rule laid down by the Judicial Committee in the case of *Katama Natchiar v. The Rajah of Shivagunga* (4), was applicable only to decrees fairly obtained against the widow in a contested and *bona fide* litigation, and would not apply to a compromise by the widow which could not clearly be regarded as on a higher footing than any alienation which the widow in possession of the estate might have made. A similar view has been adopted by the Bombay High Court in the case of *Jeram Laljee v. Veerbai* (5), in which it was ruled that anything short of a decree in a suit contested to the end could not have the quality attributed to a decree in a contested litigation by the Judicial Committee in the case of *Katama Natchiar v. The Rajah of Shivagunga* (4). Precisely to the same effect is the decision of the Allahabad High Court in the cases of *Gobind Krishna Narain v. Khunni Lal* (6), and *Mahadei v. Baldeo* (7). In the first of these cases, Sir John Stanley, C.J., pointed out that the doctrine of a family settlement of doubtful claims, as enunciated in *Stapilton v. Stapilton* (8), cannot be applied to the case of a compromise by a Hindu widow so as to effect the position of a reversionery

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(1) (1880) 6 C. L. R. 76.

(2) (1882) 10 C. L. R. 337.

(3) (1886) I. L. R. 8 All. 365.

(4) (1863) 9 Moo. I. A. 539.

(5) (1903) 5 Bom. L. R. 885.

(6) (1907) I. L. R. 29 All. 487.

(7) (1907) I. L. R. 30 All. 75.

(8) (1739) 1 White & Tud., 8th  
Ed., 234; 1 Atk. 2.

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heir, because in that very case the statement of the rule is limited by the important qualification that the compromise "is within the power of each party, if honestly done." The learned Chief Justice held that a Hindu widow or daughter, who is a limited or qualified owner, has not the power to enter into compromise so as to bind the inheritance in the hands of the reversionary heirs. The view indicated in the series of decisions to which we have referred, has been recently followed in this Court as settled law: see *Roy Radha Kissen v. Nauratan Lal* (1), where the earlier authorities are reviewed and *Asharam Sadhani v. Chandi Churn Mukerjee* (2). No doubt, as pointed out by Mr. Justice Ameer Ali in *Nicholas v. Asphar* (3), a consent-decree is just as binding on the parties to the proceeding as a decree after a contentious trial, a position which is amply supported by cases of the highest authority: *In re South American and Mexican Company* (4); *The Bellicairn* (5). But the matter obviously stands on a different footing when the question is raised whether the consent-decree may operate to the prejudice of persons not parties thereto. As was well observed in *Huddersfield Banking Company, Limited v. Lister* (6), the real truth of the matter is that a consent-order is a mere creature of the agreement; and that if greater sanctity were attributed to it than to the original agreement itself, it would be to give the branch an existence which is independent of the tree. To use the language of Lord Justice Kay, the consent order is only the order of the Court carrying out an agreement between the parties. We must consequently hold that the rule recognised in the long series of decisions, to which we have referred, is well founded on principle and ought to be maintained. The plaintiff is therefore entitled to a declaration that the consent-decree, as a decree, is not binding upon her as the reversionary heir to the estate of her father. Hence the second ground urged on behalf of the appellant must prevail.

(1) (1907) 6 C. L. J. 490, 525.

(4) [1895] 1 Ch. 37.

(2) (1908) 13 C. W. N. 147.

(5) (1885) 10 P. D. 161.

(3) (1896) I. L. R. 24 Calc. 216.

(6) [1895] 2 Ch. 273.

The third ground urged on behalf of the appellant is that the consent-decree is inoperative against the plaintiff because, based on a compromise, prejudicial to the interest of the reversionary heirs and in excess of the powers of the widow as qualified owner. This ground raises an important question of fact. The learned Judge in the Court below came to the conclusion that Kanai Lal Sen had spent Rs. 8,000 for the benefit of his daughter, partly on account of the maintenance of herself and her daughter and partly on account of the marriage of his granddaughter, and the remainder on account of the litigation expenses to enable his daughter to recover the estate of her husband. The learned vakil for the appellant has directed a stringent criticism upon this part of the case, and has minutely scrutinised the evidence adduced by Kanai Lal Sen and by Katyayani to show that the compromise was a fair transaction. The learned vakil has invited our attention to the fact that, whereas, according to Kanai Lal himself, the share of the estate taken by him was worth at least Rs. 30,000 according to the finding of the Subordinate Judge, he cannot in any sense be treated as a creditor of his daughter to the extent of more than Rs. 8,000. In the course of the able argument which he addressed to us on this point, he further contended that the finding of the Subordinate Judge, even to the extent to which it is favourable to Kanai Lal Sen, is based upon very questionable evidence; that the accounts produced have been manufactured for the purposes of the suit; that trustworthy vouchers have not, in all cases, been brought forward; that there are serious contradictions in the evidence now given, taken along with previous statements of the parties as to the period during which Katyayani and her daughter were maintained by her father; and that, in substance, although it may be conceded that Kanai Lal has spent some money on behalf of his widowed daughter, the evidence as to what precise amount has been spent is wholly illusory and will not stand the test of criticism. He has finally argued that the price which the daughter has paid to her father is manifestly disproportionate to the benefit conferred, while Kanai

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Lal, according to the Subordinate Judge, has spent about Rs. 8,000 for the benefit of his daughter, he has secured for himself an absolute interest in properties which we now know are worth at least Rs. 50,000. Under these circumstances, the learned vakil for the appellant has contended that, even if what is assailed had not been a consent-decree but a private conveyance, the transaction could be successfully impeached by the reversionary heir who finds that her inheritance has been taken half by her mother as absolutely entitled thereto, and the other half by her maternal grandfather as the price for his assistance, with the possible result that no part of the estate of her father may ever reach her hand. The considerations which have been thus urged are obviously of a weighty character, but we do not propose to examine them, because, as the consent-decree must be declared inoperative as against the plaintiff on the first and second grounds taken by the appellant, it is needless to scrutinise the facts minutely for the purpose of a decision on the third ground.

In the view indicated above, the conclusion is irresistible that the plaintiff is entitled to the declaration that the consent-decree is inoperative against her. But on behalf of Katyayani and Kanai Lal, what must be deemed a desperate effort has been made to defeat the suit on the ground that the plaintiff Rajlakshmi has no interest in the estate covered by the decree, and is consequently not entitled to maintain a declaratory suit in respect thereof. The learned counsel who appeared on behalf of Kanai Lal Sen strenuously contended that upon a true construction of the will of Rajballav Seal the estate never vested absolutely in the first adopted son, Jogendra Nath, so that the plaintiff cannot claim to be the reversionary heir of her father with regard to such estate. We intimated to the learned counsel, in the course of the argument he addressed to us, that it was not open to him to take this position, because the compromise-decree impeached by the plaintiff was based obviously on the footing that the Sens were entitled to one-fourth share of the estate, that the remaining three-fourths belonged to Katyayani as the widow



of Jogendra Nath, and that the three-fourths ought to be divided in equal halves between Katyayani and her father. In spite of this expression of opinion, the learned counsel insisted that he was entitled to address the Court upon this point, and we accordingly afforded him full opportunity to place before us his arguments upon the question of the construction of the will. Since the close of the arguments, we have minutely scrutinised the records of this litigation, as also of the three previous suits between the parties or their predecessors, and we need only state that such examination has strongly confirmed the view we first indicated that neither Kanai Lal nor Katyayani was entitled in the present litigation to contend, as was sought to be done, that Katyayani was not entitled to the estate as the widow of her husband, Jogendra Nath. The history of the previous litigations shows that, in the suit of 1890, the Sens obtained a declaration that they were entitled to an one-fourth share in the estate of Rajballav Seal. In the suit of Amulya Charan, it was conceded by the then plaintiff that he was entitled to a three-fourths share and the Sens to the remaining one-fourth. A similar position with reference to the Sens was adopted by Katyayani, at that time a defendant, when she contended that she, and not her brother, was entitled only to the three-fourths share. There was no suggestion on her part at the time that the Sens were not entitled to an one-fourth share. In the suit of Katyayani herself, she originally came to Court upon the allegation that she was entitled to only three-fourths share of the estate, and that the remainder belonged to the Sens. It was only after the decision of this Court in the appeal of Amulya Charan, that she sought to profit by the observations of the learned Judges, and had her plaint amended so as to include a claim to the whole estate. But the position which she then took up was, not that she had no interest in the estate as the widow of her husband, and that the whole estate had passed to the Sens, but that she was entitled to the whole to the exclusion of the Sens. She successfully asserted this title in the Court of first instance. Her position throughout the trial in the Original Court was that

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there was an intestacy as to the *corpus* which thus vested in the first adopted son, Jogendra Nath, and subsequently passed by succession to herself. When the Sens appealed to the District Judge, the position was not materially changed, for the claim which Katyayani continued to assert was based exclusively on her right as the widow of Jogendra Nath. In the face of these circumstances it has been boldly suggested in this Court that the compromise was made on the basis that Jogendra had no interest at all, and that the Sens made a present of three-eighths share to Katyayani and another three-eighths to Kanai Lal Sen. The learned counsel for Kanai Lal Sen has seriously contended that he took a three-eighths share of the estate, not on the assumption that it was the property of Jogendra Nath, but that it was the property of Rajballav Seal, which had passed to the sons of his daughter. The position is manifestly untenable, for what claim had Kanai Lal against the estate of Rajballav Seal so as to justify an alienation in his favour? The ground assigned in the petition of compromise for giving a share to Kanai Lal Sen was that he as the father of the then plaintiff, Katyayani, was justly entitled to get a share as the equivalent of his advances of money and trouble for the series of litigations ending with that compromise. To whom had he advanced the money and who was the party benefited by the trouble he had taken in the conduct of the series of litigations? Obviously it was his daughter, and the only intelligible view of the compromise is that it gave four-sixteenths share to the Sens and their mortgagee, and that the remainder, to which the title of Katyayani was admitted by the Sens, was equally divided between herself and her father. The suggestion that Kanai Lal obtained a share of the estate of Rajballav Seal as such is entirely baseless. He might reasonably be treated as the creditor of his daughter, and the share he took must be deemed to be a share which, had he not taken it, would have belonged to his daughter; in other words, he took not directly from the Sens, but from his daughter, Katyayani. The inference, therefore, follows that the true effect of the consent-decree was that the Sens took

one-fourth of the estate and the remainder was taken by Katyayani and her father in equal halves; this latter three-fourths was obviously treated as the property of Jogendra Nath, because Katyayani would not be entitled to anything except as the widow of Jogendra Nath, and Kanai Lal Sen would not be entitled to claim anything except as the creditor of Katyayani. The plaintiff, therefore, may justly assume the position that as by this consent-decree the three-fourths share of the estate has been dealt with as the property of her father, Jogendra Nath, she, as the reversionary heir, is entitled to the declaration that the decree is not operative against her. In this view, we must hold that neither Katyayani nor Kanai Lal Sen can be allowed, for the purposes of the present litigation, to assume the position that Jogendra Nath never took any interest in the estate of Rajballav Seal, and that Katyayani had at no time any claim thereto as widow of Jogendra Nath. We may here observe that, although this suggestion was made in paragraph 26 of the written statement of Kanai Lal Sen, it was really inconsistent with the suggestion made in paragraph 16 that he was entitled to be reimbursed from Katyayani or Amulya Charan, whoever might succeed in the litigation. The argument now sought to be advanced is also contrary to the allegations made in paragraph 9 of the written statement of Katyayani and of paragraph 8 of the written statement of one of the Sens, who themselves do not claim more than one-fourth share of the estate. We may also remark that no trace is to be found in the judgment of the Subordinate Judge of any argument addressed to him to the effect that Katyayani had no shadow of a title to the estate, and it is manifest that such a position cannot be seriously assumed by her or by her father in the present litigation. We must therefore, refuse the invitation of the learned counsel to determine the title of Jogendra Nath under the will of Rajballav. We may add that the question is one not wholly free from difficulty, and it would, in our opinion, needlessly embarrass the parties if we were to pronounce an opinion upon it when it is not necessary for us to do so. It is further worthy of re-

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mark that if the will ever requires to be construed for the benefit of the present parties, a question may very well arise as to how far the matter may be deemed concluded by the decisions in the suit of the Sens in 1890, and of Amulya Charan in 1901, and by the pleadings of the parties in the suit of Katyayani herself in 1903. This preliminary question is obviously one of some intricacy; it does not appear to have been suggested to the Court below, and the materials placed before us are by no means sufficient for its adjudication. This is an additional reason why Katyayani and Kanai Lal Sen should not now be permitted to assume a position wholly contradictory to the position previously taken by them and to their pleadings in the present case.

The result, therefore, is that this appeal must be allowed and the decree made by the Subordinate Judge discharged. The plaintiff will have a declaration that the consent-decree, made on the 9th January, 1907, is void and inoperative as against her, and that she is, in no way, bound by the partition proceedings which have taken place in execution of that decree. The plaintiff is entitled to her costs both here and in the Court below as against the 1st and 4th defendants.

S. M.

*Appeal allowed.*

## APPELLATE CIVIL

*Before Mr. Justice Coxe and Mr. Justice Teunon.*

SHASHI BHUSHAN BEED

*v.*

JOTINDRA NATH ROY CHOWDHRY.\*

1911

May 9.

*Partition, suit for—Procedure—Amendment of plaint by order of Court altering nature of suit—Acquiescence by plaintiff—Appeal, in disregard of amendment of plaint, not barred.*

It is incumbent on the Court, in a suit for partition, to come to a clear and definite finding that the plaintiff had title to the property, before proceeding further into the case, and a judge on appeal should also observe the same procedure.

*Bidhata Rai v. Ram Chariter Rai* (1) referred to.

If the Judge, on appeal, finds the question of title to the property in favour of the plaintiff, any finding on the question of possession does not debar the Judge from affirming the preliminary decree for partition passed by the first Court and does not justify him in remanding the case to the lower Court for retrial.

At the hearing of the appeal, the Judge held that the plaint should be amended and the plaint was accordingly amended with the acquiescence of the plaintiff, so as to alter the nature of the suit. A fresh written statement was filed by the defendant and fresh issues were framed. These facts did not preclude the plaintiff from filing an appeal, within the time allowed by limitation, if, on reflection, he thought that the action taken by him in amending the plaint was injudicious.

SECOND APPEAL by the legal representatives of Shashi Bhushan Beed, the plaintiff.

This was a suit for partition of immoveable property.

The allegation in the plaint were, *inter alia*, that Mathuranath Roy Chowdhry and Priyanath Roy Chowdhry had equal shares in the properties mentioned in schedules A and B annexed to the plaint. After the death of Mathuranath his

\* Appeal from Order, No. 50 of 1910, against the order of F. Roe, District Judge of 24-Pergs., dated Nov. 26, 1909, reversing the decree of Mahim Chandra Sarkar, Subordinate Judge of that District, dated May 12, 1909.

(1) (1907) 12 C. W. N. 37.

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share devolved upon the defendant, and the share of Priyanath upon his three sons. The sons of Priyanath mortgaged their share to one Mirza Ahmed Beg. The said Mirza, in execution of his own mortgage-decree and also in execution of money-decrees obtained by others, purchased the properties in dispute and took possession of the same. On the death of the said Mirza, his estate was taken over by the Administrator-General of Bengal, who had his name registered under the Land Registration Act. Subsequently in a partition suit in the High Court amongst the heir of the said Mirza, the properties described in schedules A and B were allotted exclusively to the eldest son of the said Mirza, *viz.*, Guznafar. The plaintiff purchased the interest of Guznafar in the properties in dispute. The plaintiff was in possession of his undivided share in the aforesaid properties jointly with the defendants and had his name registered under the Land Registration Act. The defendants having refused to partition the lands amicably, the plaintiff brought this suit for partition and separate possession of his share.

The defendants virtually admitted the plaintiff's right to the properties described in schedule B to the plaint, but denied his title to the properties in schedule A, and with regard to these properties, the defendant contended, *inter alia*, that the defendants had acquired title to the said properties by adverse possession and that the plaintiffs were not entitled to the reliefs sought.

The Subordinate Judge found in favour of the plaintiffs on the questions of title and possession and passed a preliminary decree for partition.

On appeal, the District Judge held that the suit was really a suit to obtain declaration of title and possession. The view was accepted by the plaintiff's pleader and the plaint was amended and the *ad valorem* court-fee for a title suit was paid. The Judge then remanded the case to the Court below for retrial.

Against this order of remand, the legal representatives of the plaintiff appealed to the High Court.



*Babu Mahendranath Roy* (with him *Babu Bipinchandra Mallik*), for the appellant. The appellant's title to and possession of some of the joint properties in suit being admitted, the suit ought to have been regarded a suit for partition and the court-fee should have been taken as such. *Bidhata Rai v. Ram Chariter Rai* (1). See also *Mohendro Chandra Ganguli v. Ashutosh Ganguli* (2). The decrees of Land Registration Court are evidence of possession: *Shyama Sundari Dasya v. Mahomed Zarip* (3). As regards the admission of the pleaders in the Court below, they being on points of law are not binding: *Beni Pershad Koeri v. Dudhnath Roy* (4). The remand order is illegal. The preliminary decree has not been set aside even. There should be a decree for partition for the plots in schedule B, at any rate, title to, and possession in, which are admitted.

*Babu Saratchandra Roy Chaudhuri* (with him *Babu Lalitmohan Banerji*), for the respondent. The judgment of the District Judge is quite correct. He finds that the suit is not a *bona fide* suit for partition. *Ad valorem* Court-fee must be paid and was paid. The appellant is precluded from questioning the remand order, it being made at his instance and for his benefit. The case of *Bidhata Rai v. Ram Chariter Rai* (1) is distinguishable. Further, here the group of properties regarding which possession and title is admitted are situated at a quite different place and far away from those regarding which there is real dispute. The title has not been found in favour of the appellant. If the appellant has lost his title by adverse possession, he cannot get relief by bringing a partition suit.

*Babu Mahendranath Roy*, in reply. Possession of one co-sharer is possession of another. The remand was neither at the instance of, nor for the benefit of, the appellant. The learned Judge took one view of the law and the pleader for the appellant partially admitted the same. The pleaders below were prepared to pay the court-fee as on a suit for recovery of possession, but they would not admit that the plaintiff

(1) (1907) 12 C. W. N. 37.

(3) (1907) 9 C. L. J. 91.

(2) (1893) I. L. R. 20 Calc. 762. (4) (1899) I. L. R. 27 Calc. 156.

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iff was out of possession. The lower appellate Court has not dealt with the proper issues in the case. Theoretically, the appellant might have come up in appeal here the day after the order of remand was made, but he has appealed in time, and the proceedings in the first Court which were taken immediately after remand could not be a bar to his getting relief. We want the case to be tried on the pleadings as it stood before the order of remand.

*Cur. adv. vult.*

COXE AND TEUNON JJ. This is a suit for partition of the lands described in the two schedules attached to the plaint. It is admitted that the plaintiff is co-owner with the defendants of the lands described in schedule 2; but his title to, and possession of, any interest in the lands described in the first schedule to the plaint is denied.

The suit was decreed by the Subordinate Judge, and a preliminary decree for partition was passed.

The defendants appealed to the District Judge. The District Judge came to no clear finding on the principal question in the suit, namely, whether the plaintiff was entitled to partition of the lands described in the first schedule. He regarded the suit as one to obtain a declaration of the plaintiff's title and possession, under the garb of a suit for partition; and he considered that the court-fee payable should be calculated *ad valorem* on the property in suit and the case retried as a suit for declaration of title and recovery of possession. This view appears to have been accepted or, at any rate, acquiesced in, by the plaintiff's pleader; and he agreed to amend his plaint, so as to make it one for a declaration of the plaintiff's title as well as for partition and to pay the necessary Court-fee. The learned District Judge thereupon directed that the case should go back to the Subordinate Judge, apparently for retrial.

Against this order the plaintiff appeals, and it is argued on his behalf that this order of the District Judge remanding the case, is not justified by law.

It appears to us that this contention ought to prevail. No doubt it was incumbent on the learned District Judge, before he could affirm the preliminary decree for partition passed by the Subordinate Judge, to come to a clear and definite finding that the plaintiff had title to the property which is the subject of this appeal, that is to say, the property described in the first schedule to the plaint. Unless the plaintiff can make out his title to the property, he clearly has no right to partition of it. But, as regards the question of possession, it appears to us that, if the plaintiff has title to the property and is a co-owner of that property with the defendants, the doubts felt by the learned District Judge with regard to his possession did not justify him in refusing the relief sought. The learned District Judge does not explain how this case is distinguishable from that of *Bidhata Rai v. Ram Chariter Rai* (1), which was cited and relied upon by the Subordinate Judge. So far as the facts have been laid before us that decision appears to be applicable. It has been argued that as the property described in the first schedule is totally different from the property described in the second schedule, that ruling is inapplicable. To this contention we are not prepared to accede. If the plaintiff and the defendants are, as a matter of fact, co-owners of the land described in both schedules, and the plaintiff's possession is admitted in the lands described in the second schedule, which appear to constitute the more valuable portion of the property, the fact that the lands in the first schedule are situate in a different village, and are entirely different properties from those contained in the second schedule, does not in our opinion, take the case outside the scope of the decision which we have quoted. We think, therefore, that the proper course for the District Judge to have adopted on this occasion was to have come to a distinct finding as to whether the plaintiff had succeeded in proving his title to the lands comprised in the first schedule attached to the plaint. He was not entitled to remand this point for retrial to the Subordinate Judge. If he

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found it against the plaintiff, there was an end to the case, so far as that property was concerned. But if he found it in favour of the plaintiff, then his finding in respect of possession did not debar him from affirming the preliminary decree for partition, and did not justify him in remanding the case to the Subordinate Judge for retrial.

It has, however, been argued on behalf of the respondent that the plaintiff is now precluded by his own conduct from contesting the propriety of the District Judge's decision. It appears that he acquiesced in that decision and amended his plaint; that the defendant subsequently filed a written statement and that fresh issues were framed. But no authority has been shown us for holding that the plaintiff is precluded by this conduct from filing an appeal within the time allowed by limitation, if, on reflection, he thinks that the action he has taken is injudicious.

Accordingly the case must go back to the learned District Judge, in order that the appeal may be reheard on the pleadings as they stood before the amendment. He must come to a decision as to whether the plaintiff had a subsisting title at the time of the institution of the suit; and if he finds that in favour of the plaintiff, he must then come to a decision as to whether the Subordinate Judge's preliminary decree for partition, so far as regards the property described in the first schedule to the plaint, should or should not be affirmed.

As regards the property described in the second schedule to the plaint, it is admitted by both sides that that ought to be partitioned.

The costs will abide the result.

S. M.

*Case remanded.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,  
and Mr. Justice Woodroffe.*

ABDUL HOSSAIN

*v.*

RAM CHARAN LAW.\*

1911

May 10.

*Footings—Trespass—Survey Map, evidentiary value of—Mandatory Injunction—Specific Relief Act (1 of 1877) Chap. X.—Presumption.*

The existence of footings to a wall, in the circumstances of the case, raised the presumption, that the land covering such footings belonged to the owner of the wall, to which they appertain.

Where a wall was constructed by the defendant on the land covering plaintiff's footings, and after its completion, a suit was brought by the plaintiff for trespass, the plaintiff not having been guilty of delay or acquiescence:—

*Held*, that the proper remedy was by way of mandatory injunction ordering the demolition of the defendant's wall.

APPEAL by the plaintiff, Mullah Abdul Hossain, from the judgment of Fletcher J.

The plaintiff was the owner of the premises No. 17, Ezra Street, in Calcutta, which he had purchased in 1904. These premises were bounded on the south in part by a passage, and in part by the premises No. 16, Ezra Street, belonging to the defendant. Some time in the month of December 1908, or in the month of February 1909, a wall 12ft. 8in. in length, 1ft. 1in. in width and 12ft. 5in. in height was erected by the defendant in the immediate proximity of the plaintiff's premises, and the point in dispute in the suit was whether this wall was or was not a trespass on the plaintiff's land.

The southern boundary wall of the plaintiff's building, which was an old one, had at its basis on the south a spreading course or footings of the width of 1ft. 1in. and it was on the land covering these footings that the defendant's wall was built. The lateral extension of the cornices of the plaintiff's building was such that the defendant's wall was built within the line of the cornices.

\* Appeal from Original Civil, No. 42 of 1910, in Suit No. 490 of 1909.

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iff's house, corresponded precisely with the southern extension of the footings.

It was contended by the plaintiff, that the land occupied by the footings belonged to him, that the defendant's wall constituted a trespass, and that the stability of his building was prejudicially affected by the erection of the defendant's wall. The plaintiff instituted this action on the 15th May, 1910, praying for a declaration of his right to the land, for a mandatory injunction for the demolition of the defendant's wall and for damages.

The defendant denied that the land in dispute belonged to the plaintiff or that his wall constituted an encroachment and contended that "inasmuch as the Calcutta survey plan of 1887-93 made under the Calcutta Survey Act (I of 1887) showed that the plaintiff had no land beyond the outer face of the southern wall of his premises No. 17, Ezra Street, the suit was not maintainable as it was in effect a suit to set aside demarcation of boundaries made under the provisions of that Act." The defendant took the further plea that in any event the plaintiff's claim was time-barred inasmuch as the wall in dispute occupied the site of an ancient wall of his own which had existed there for more than thirty years. There was a considerable conflict of testimony on this point, evidence being produced on behalf of the plaintiff to the effect that the site of the present wall was previous to its erection occupied by a narrow drain.

The conveyance granted to the plaintiff on the purchase of No. 17, Ezra Street, showed the premises to be bounded as follows:—"On the north by No. 18, Ezra Street, on the south by narrow lane, on the east by the house and premises No. 16, Ezra Street, now or lately belonging to Roop Churn Chunder and on the west by Ezra Street." The Survey Plan of 1887-93 showed the plaintiff's premises to be bounded on the south partly by a public passage and partly by a covered in area belonging to the defendant's premises, but did not shew either the drain sworn to by the plaintiff or the ancient wall sworn to by the defendant.



The suit came on for hearing before Fletcher J. and on the 4th April, 1910, his Lordship dismissed the suit with costs. His Lordship came to the conclusion that there was nothing in the conveyance to shew that the plaintiff had any title to the land in question, and that the survey map shewed clearly that the plaintiff's premises did not extend beyond the south wall of his premises. On the question of footings his Lordship observed:—

“How does the plaintiff in these circumstances get any title to this piece of land? It is said, and it appears to be true, that the footings of the foundation of the plaintiff's south wall underneath the soil project over this piece or narrow strip of land, and there is or has been an underground drain there. That these footings do in fact project over this piece of land there can be little doubt. In my opinion that does not give the plaintiff a greater right to the land than he has acquired by adverse possession by putting his footings on the defendant's land. It is wholly wrong to presume in favour of a person who has put underground footings for his foundations that the whole of the surface of the land up to the Heavens and to the centre of the earth becomes his. By putting the footings of the foundation into the land of which he cannot show that he is the owner, he cannot become the owner of the surface above it. It is not a case where the plaintiff shows that he was the original owner he having built his foundations on his own land, *i.e.*, absolutely on that narrow strip of land.

What are the rights of the plaintiff? This house is of old structure dating back for many years. He has a right to maintain the footings of his foundation on that strip. He says he has the right to the use of the drain which is said to exist on this piece of land. I am not satisfied that the drain belongs to the plaintiff's premises. If it has been his I think that the probabilities are that he deliberately abandoned it many years ago when the Corporation of Calcutta introduced the system of main drainage in connection with these houses. One of the plans show that the passage extended to the east with connection to the plaintiff's house.

The evidence establishes that the only right the plaintiff has is to have maintained underneath, the footings of his foundation. Has that right been interfered with? It is said that the stability of the plaintiff's house has been threatened. The plaintiff's house is worth about Rs. 90,000. If there was any evidence on which one could rely that the stability of the plaintiff's house was jeopardised by the new wall by having additional weight on the footings, that would be a strong case to order the defendant to take down wholly or in part this wall so as not to endanger the plaintiff's structure. The expert evidence of Mr. Johnstone, however, really comes to nothing. He cannot say whether it has or is ever likely to endanger the plaintiff's structure. I do not believe that the erection of a small wall abutting on the plaintiff's

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iff's narrow wall added such additional weight to the foundation of the plaintiff's premises that it is likely to effect injuriously the stability of the plaintiff's house.

In my opinion no case has been made out, calling upon the Court to interfere. The plaintiff has failed to prove that he is the owner of the narrow strip of land on which the wall has been built. He has also failed to prove that the stability of the house has in any way been affected by the erection of the wall. The suit fails and must be dismissed with costs on scale No. 2."

From this judgment the plaintiff appealed.

*Mr. Braunfeld* (with him *Mr. Morison*), for the appellant. Every one builds his house on his own land and the main wall must necessarily be on the land of the owner. To whomsoever the wall belongs, to him belongs the land on which it stands. The footings are a part of the wall and, therefore, the land on which the footings are laid, belongs to the owner and the land above the footings must *a fortiori* belong to the owner. A presumption, therefore, in this case exists that the land both below and over the footings is the plaintiff's, and his possession and that of his predecessors and their enjoyment for a very long time are sufficient title in the plaintiff. The onus is on the defendant to disprove. He has not discharged that onus. There is only one case as to the question of footings and foundations: *Mayfair Property Co. v. Johnston* (1).

*Mr. Mehta* (with him *Mr. B. C. Mitter*), for the respondent. The survey map of 1887 shows that there is no opening between the plaintiff's wall and the defendant's. This is conclusive against the plaintiff and even if this be not so, the defendant has had his wall there flush with the plaintiff's wall for over 30 years, and therefore limitation bars the plaintiff's suit. It is true that there are some cases decided against the defendant's view, but here the survey map must be considered, as by that survey the boundary was settled.

*Mr. Braunfeld*, in the course of his reply, was stopped.

JENKINS C.J. The litigants in this suit are two neighbouring house-owners, the plaintiff being the owner of No. 17,

Ezra Street, and the defendant of No. 16, Ezra Street, in the town of Calcutta, and the point in dispute is whether a wall which in December 1908 or February 1909 was erected by the defendant in the immediate proximity of the plaintiff's premises was or was not a wrongful encroachment entitling the plaintiff to relief in this Court.

The plaintiff alleges that the wall was built on his land, and that it therefore constituted a trespass. The defendant on the other hand denies this, and he goes on to plead that even if it was built on the plaintiff's land, still it occupied the site of an old wall of his on that land which had stood there for more than thirty years; and so, he says, any claim by way of trespass now fails.

The case came in the first instance before Mr. Justice Fletcher who decided in the defendant's favour, his view being that the plaintiff had failed to establish that the site of the wall as it now stands was the property of the plaintiff. On the second point he expressed no definite opinion.

We first then have to see how far the plaintiff has succeeded in establishing his title to this piece of land, apart from any possible subsequent encroachment. The southern wall of No. 17, Ezra Street, faces in part on a public lane and in part on a portion of the premises No. 16, Ezra Street. At the base of this wall there now exists, and there has existed ever since the wall was constructed, a spreading course or footings of the width of 13in. on the south side of the wall of No. 17. It is on these footings that the defendant's wall stands. Now, are these footings within the limits of the plaintiff's land? It is not suggested that the title-deeds in this case contain anything that is opposed to that view. The description of the parcels in the deed brought to our notice certainly does not negative the idea that these footings were built within the limits of the plaintiff's land. On the other hand, we have it that these footings have been there for a great length of time, and I think it is a fair presumption in the circumstances of the case to hold that they were not placed there wrongfully. I see no ground for pre-

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suming a trespass on the part of the plaintiff's predecessor when he constructed that wall. The inference that I would rather draw would be that when these footings were placed in the position that they now occupy, they were placed within the limits of the land belonging to the plaintiff's predecessor and now belonging to the plaintiff. This view I think receives some corroboration from the fact that the lateral extension of the cornices of this house towards the south corresponds precisely with the southern extension of these footings.

Before us, indeed, no serious attempt has been made to support this finding of the learned Judge, and I do not hesitate to come to the conclusion that the plaintiff has established that these footings are within the limit of his property. While the defendant has not sought to sustain his case on the ground which found favour with the learned Judge he has urged before us and has made it his principal point that the new wall of which complaint is now made in fact occupies the site of an old wall that stood there for more than thirty years. If that be so, obviously he would have a very good answer to the plaintiff's claim.

Now, how does the case stand as to that? The onus clearly rests on the defendant. Has he discharged that onus?

[After discussing the evidence his Lordship said:—]

These circumstances appear to me not merely to throw considerable doubt on the evidence of the defendant but convince me that the old wall of the porch was, as the plaintiff maintains, not flush with the wall of No. 17. Therefore the defendant's plea that his new wall occupies the site of the old wall fails. The just conclusion from this is that there has been an unlawful encroachment. Now, if that be so, there is a wrong in respect of which the plaintiff is entitled to a remedy. In the prayer of his claim he seeks a declaration, a mandatory injunction and damages. In the view, I take it is unnecessary to enter into the question of damages, but I think the plaintiff is entitled to a mandatory injunction, and in the circumstances it appears to me that that is his proper remedy. To begin with I do not think that there has been any delay or acquiescence

on the plaintiff's part. There is a conflict of evidence on this point as between Abdul Ali and Ram Charn Law, and of the two versions I prefer that of Abdul Ali. It is true that the wall has been completed or was completed before the suit was brought, still we are here concerned with trespass on the land of the plaintiff, a trespass not carried out as the result of long and continuous work but of work completed quietly and promptly: not only has a trespass been committed, but the trespass is one which still continues and will hereafter continue to be committed as long as the wall remains in its present site. That being so, I think the proper remedy is by way of mandatory injunction. The case appears to me to come clearly within the law as established in Chapter X of the Specific Relief Act, and I think that in accordance with what is provided in section 55 it will be right for us to compel the defendant to pull down so much of the wall as is an encroachment on the land of the plaintiff, that is to say so much of the wall as stands over the 13 inches to which the plaintiff has established his title in this suit. As I have said, there is no case for damages, but the plaintiff will get his costs both of the suit and the appeal from the defendant.

A month's time is allowed to pull down the wall, with liberty to apply if necessary.

WOODROFFE J. I agree.

*Appeal allowed.*

Attorneys for the appellant: *Bonnerjee & Bonnerjee.*

Attorney for the respondent: *R. C. Hazra.*

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## ORIGINAL CIVIL.

*Before Mr. Justice Stephen.*

1911

May 17.

BIJOY KRISHNA KARMAKAR

v.

RANJIT LAL KARMAKAR.\*

*Hindu Law—Adoption—Prior right of adoption as between elder and younger widows—Anumatipatra, construction of—Simultaneous or successive Adoption.*

Where the deceased had executed an *anumatipatra* in these terms.—“In favour of the first wife, S. B. S. D., and the second wife S. D., . . . giving permission that when I shall be no more, each of my two wives shall be at liberty to act according to their own religious tenets by adopting three sons successively, that is one after another”—

*Held*, that the effect of such an instrument was not to sanction a simultaneous adoption, but to give a power of adoption to the two widows successively. That this being so, the elder widow had the prior right to exercise the power of adoption and that the younger widow had no right to adopt before the elder widow had exhausted her right, or refused to use it.

*Rakhmabai v. Radhabai* (1) followed.

*Amava v. Mahadgauda* (2), *Mondakini Dasi v. Adinath Dey* (3), and *Akhoy Chunder Bagchi v. Kalapahar Haji* (4) referred to.

## ORIGINAL SUIT.

One Shib Krishna Karmakar, a Hindu governed by the Bengal School of Hindu Law, died on the 29th November, 1903, leaving two widows, Biraja Sundari Dasee the elder and Shashibala Dasee, the younger widow. The day before his death he executed an *anumatipatra*, which is fully set out in the judgment, and the important portions of which are as follows:—“In favour of the first wife Sreemutty Biraja Sundari Dasee and the second wife Shashibala Dasee . . . giving permission in writing that when I

\*Original Civil Suit No. 1009 of 1909.

- (1) (1868) 5 Bom. H. C. (App.) 181. (3) (1890) I. L. R. 18 Calc. 69.  
 (2) (1896) I. L. R. 22 Bom. 416. (4) (1885) I. L. R. 12 Calc. 406;  
 L. R. 12 I. A. 198.



shall be no more, each of my two wives shall be at liberty to act according to their own religious tenets by adopting three sons successively, that is one after another." On the 13th April, 1905, the younger widow adopted the defendant, and on the 9th March, 1908, the elder widow adopted the plaintiff. The plaintiff instituted this suit by which he sought to have the adoption of the defendant by the younger widow set aside and his own adoption by the elder widow declared valid. He alleged that the adoption of the defendant was not a genuine one, and submitted that in any event the senior widow had the prior right to exercise the power of adoption, and that she having exercised such power in favour of the plaintiff, the adoption of the defendant should be declared void and inoperative, and the adoption of the plaintiff should prevail.

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The defendant denied that the adoption was not a genuine one, and submitted that as the younger widow had exercised her power of adoption first in point of time, her adoption should take priority; but should the Court hold otherwise, he further submitted that on the construction of the *anumatipatra* a power of simultaneous adoption had been given to both the widows jointly, and that as this was bad in law, the *anumatipatra* itself should be declared invalid.

*Mr. N. N. Sircar* and *Mr. C. C. Ghose*, for the plaintiff. In Bengal the younger widow cannot adopt until the elder widow has refused to exercise her right of adoption: *Mondakini Dasi v. Adinath Dey* (1). The younger widow cannot adopt without the consent of the elder: *Padajirav v. Ramrav* (2); but the elder widow can adopt without the consent of the younger: *Rakmabai v. Radhabai* (3).

*Mr. I. B. Sen* and *Mr. P. Mitter*, for the defendant. The Bombay decisions do not apply to Bengal, because in Bengal a widow cannot adopt without the express authority of her husband, whilst in Bombay such authority is implied. The case of *Mondakini Dasi v. Adinath Dey* (1), merely says

(1) (1890) I. L. R. 18 Calc. 69. (2) (1888) I. I. R. 13 Bom. 160.

(3) (1868) 5 Bom. H. C. (App.) 181.

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that where the elder widow refuses to adopt, the younger widow can do so, but does not go so far as to say that until the elder widow refuses to adopt, the younger widow cannot do so. In this case the younger widow having been the first to adopt in point of time, her adoption should prevail. Moreover, the *anumatipatra* gives no preference to either widow, and as such it contemplates the existence of two sons at the same time, and creates a power of simultaneous adoption in favour of both the widows jointly. It is, therefore, void in law: *Akhoy Chunder Bagchi v. Kalapahar Haji* (1).

Mr. N. N. Sircar, in reply. The case of *Akhoy Chunder Bagchi v. Kalapahar Haji* (1) shows that the effect of an *anumatipatra* such as this is not to create a power of simultaneous adoption, but to contemplate successive adoption. The law in Bengal is the same as the law in Bombay. The reasons for the Bombay decisions exist equally in Bengal. Vishnu's text, quoted in Colebrooke's Digest, Bk. IV, Art. XLIX, is in my favour. Vishnu is an authority in Bengal as well as in Bombay.

*Cur. adv. vult.*

STEPHEN J. The question I have to decide in this case is which of two adoptions is legal. The facts are simple and, if I accept all the evidence that has been given before me, are as follows:—One Shib Krishna Karmakar, a Hindu governed by the Bengal School of Hindu Law, and a Sudra by caste, died on the 29th November, 1903, leaving two widows, Biraja Sundari, the senior and Shashibala Dasee, the junior. The day before his death he executed an *anumatipatra*, the translation of which is as follows: “Anumatipatra for taking adopted son is executed to the following effect by Sri Shib Krishna Karmakar, father's name the late Ramkristo Karmakar, by occupation gold and silversmith, inhabitant of Sabhar, in favour of the first wife Sreemutty Biraja Sundari Dasee and the second wife Shashibala Dasee. I am now ailing, having been attacked with cholera. There is no knowing

what may happen to the transient body. I have no son born of my loins, although, in the hope of perpetuating the generation, I have married two wives successively, but up till now no son has been born. Consequently by this *anumatipatra* I am giving permission in writing that when I shall be no more, each of my two wives shall be at liberty to act according to their own religious tenets by adopting three sons successively, that is one after another. It is also permitted that each of my wives shall live in my ancestral dwelling-house with her adopted son. On the other hand, if she goes to live in another place with her adopted son, she shall not have any right to the moveable and immoveable properties to be left by me." Acting under the power conferred on her by this instrument, Shashibala, the younger widow, adopted the defendant on the 13th April, 1905. Biraja Sundari, the elder widow, subsequently, that is, on the 9th March, 1908, adopted the plaintiff, for whom she is acting as next friend in the present suit. This suit is brought to have it declared that the adoption of the defendant is void and inoperative, and that the plaintiff has been validly adopted. The plaintiff has satisfactorily proved that his adoption was performed in a valid and regular manner, and it is not sought to impugn its validity on any ground except that the defendant had been previously adopted, a point which it is admitted is conclusive if it is substantiated. The plaintiff does not admit that the earlier adoption was satisfactorily proved, alleging that the circumstances of the adoption are so suspicious that I ought not to accept such evidence as there is of the identity of the adopting woman with Shashibala. He also argues that supposing the earlier adoption was regular in point of form, the younger widow had no power to adopt till the elder widow had refused to adopt. The plaintiff bases his legal argument on the decision in *Rakhmabai v. Radhabai* (1). In that case the deceased husband gave no power to adopt, but by the law prevalent in Bombay it was held that a widow had a right to adopt, and the senior widow had a right to adopt without the consent of the junior. This case was followed in *Amava v.*

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*Mahadgauda* (1), and was approved of in *Mondakini 'Dasi v. Adinath Dey* (2), where it was held that when a power was given to two widows to adopt a particular person, the younger widow had power to adopt on the refusal of the elder to do so.

These cases do not, it will be observed, completely cover the present, but they recognise the prior claims of the senior widow in a way that suggests that where two widows have a power to adopt, the general rule is that the senior widow has a right to exercise her power of adoption before the junior one does so. In the text books it is laid down that the junior widow cannot adopt without the consent of the senior widow, unless the latter is leading an irregular life: see Mayne para. 118, and West and Buchler, Bk. iii, s. iii, B. 3, 16, p. 976. Counsel for the defendant does not deny that the law is so, as far as Bombay is concerned, but suggests that the law is not the same in Bengal. This contention seems to me to be baseless, particularly in a case like the present, where there seems to be no difference in the classes of the husband and the two widows, for the law laid down in *Rakhmabai v. Radhabai* (3) depends ultimately on the text quoted from Vishnu in Art. XLIX of Book IV of Colebrook's Digest, and perhaps on that quoted from Dackshaiyana, Art. LI, and both of these writers are, I understand, of as much authority in Bengal as they are in Bombay. In addition to this, counsel for the defendant has not attempted to show me any authority for the rule which he suggests applies, namely, that the first adoption should prevail, whichever widow adopts, a rule the demerits of which I need not discuss.

The result is, that I hold that, apart from the terms of the *anumatipatra*, the junior widow had no right to adopt before the senior widow had refused to do so.

As to the terms of the *anumatipatra*, a consideration of their contents only makes the plaintiff's case stronger. It is to be observed that in the Bombay cases there was no specific

(1) (1896) I. L. R. 22 Bom. 416. (2) (1890) I. L. R. 18 Calc. 69.

(3) (1868) 5 Bom. H. C. (App.) 181.

authority to adopt. In Bengal, of course, there must be such an authority, and in this case it is the *anumatipatra* that I have quoted. It is suggested by the defendant that that instrument gives a power to the two widows to adopt simultaneously, and that, as I understand the argument, the whole deed is therefore bad, as simultaneous adoptions are illegal. The proper construction of the document seems to me, however, to be quite contrary to this view. According to the decisions in *Akhoy Chunder Bagchi v. Kalapahar Haji* (1), which is also the authority for saying that simultaneous adoptions are illegal, as also by the general rules of construction, I must read the *anumatipatra* as enjoining something in accordance with the law if I can. If it leaves the power to adopt to be decided by the question of which widow adopts first, it may sanction a simultaneous adoption. I therefore hold that it did not have this effect; but left the power of adoption to be exercised according to the general law, and enforced this by indicating which was the senior and which the junior widow: that its effect was to give a power of adoption to the two widows successively, and that under the terms used the junior widow had no power to adopt till the senior widow had exhausted her right or refused to use it. The terms of the document will fully bear this construction; and it probably accords with the testator's intention. The plaintiff must accordingly succeed on the point of law, and it is not necessary that I should decide the question of fact. I may say, however, that, while on Mr. J. C. Dutt's evidence there can be no doubt that a ceremony of adoption was gone through in relation to the defendant, its circumstances were suspicious. It was performed in Calcutta, without the presence of any members of Shibkrishna's family, and seems never to have produced any practical consequences. A document of some kind was signed, but is not produced. Mr. Dutt is the only witness who speaks to the ceremony whose word I can trust, and he was present practically in his professional capacity. His identification of Shashibala as being the person who took the child in adoption

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is weak. These matters are all suspicious, and had I to decide the case on the question of fact, they would have to be carefully considered. As it is, however, I need not express any opinion on this part of the case.

I find for the plaintiff, and give judgment for him with costs on Scale No. 2.

C. E. B

*Judgment for plaintiff.*

## PRIVY COUNCIL.

MOUJI LAL

v.

CHANDRABATI KUMARI.

P.C.\*  
 1911  
 March 28;  
 May 18.

[On appeal from the High Court at Fort William in Bengal.]

*Hindu law—Marriage—Validity of marriage—Evidence and recognition of marriage—Marriage of insane person whether valid—Presumption as to performance of alleged marriage—Degrees of Insanity—Rites and ceremonies of marriage.*

The respondent's claim (as opposed to that of the appellants who were distant agnates) to letters of administration depended upon whether the deceased was her father, and whether he was legally married to her mother. The Courts in India had differed:

*Held*, (affirming the decision of the High Court), that from the time of the alleged marriage the deceased and the respondent's mother had been recognised by all persons concerned as man and wife, and so described in important documents, and on important occasions. Their daughters were respectably married as would be natural in the case of legitimate children; and that all these facts following upon a ceremony of marriage which undoubtedly took place (though its validity was attacked), afforded an extremely strong presumption in favour of the validity of the marriage, and the legitimacy of its offspring.

*Held*, also, that the objection to a marriage on the ground of the mental incapacity of one of the parties must depend (as held by the High Court) on a question of degree; and that in this case the evidence of mental infirmity was wholly insufficient to establish such a degree of that defect as to rebut the very strong presumption in favour of the validity of the marriage.

The established presumption in favour of the marriage applied to the forms and ceremonies necessary to constitute it a valid marriage;

\* *Present*: LORD ATKINSON, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.



and such forms and ceremonies had been rightly held by the High Court to have been presumably properly performed.

APPEAL from two decrees (11th April, 1905), of the High Court at Calcutta, which reversed three decrees (14th April, 1903) of the District Judge of Bhagalpur.

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The objectors in an application for the grant of letters of administration were the appellants to His Majesty in Council.

The question at issue in this appeal was the validity of the marriage of Ishri Pershad and Girjabati, the parents of the respondents Lagan Dai and Chandrabati Kumari. Girjabati died long since, and Ishri Pershad died on 31st July, 1902 and the present appeal arose out of applications made by the appellants and respondents respectively for the grant of letters of administration to his estate. If the marriage be held valid then the respondents (or one of them) are admittedly entitled to letters of administration. Should the marriage be found to be invalid, it is not disputed that the appellants Mouji Lal and Baburam, who were distant agnates of the deceased, would be entitled.

The facts are sufficiently stated in the judgments delivered by the High Court (PARGITER and WOODROFFE, J.J.), which were as follows:—

PARGITER J. "These three appeals arise out of two applications made to the District Judge of Bhagalpur in 1902, for letters of administration to the estate of Ishri Pershad, who died on 31st July, 1902, and left an estate valued at about Rs. 38,900 nett. One of his daughters, Chandrabati, applied in case No. 18 of 1902, and another Lagan Dai in case No. 31, and Mouji Lal and Baburam, the sons of his paternal cousin, applied in case No. 23. Each of these applicants was opposed by the others, and while the relationship of the two cousins was not disputed they denied the legitimacy of both the daughters on two broad grounds, namely, that the marriage of Ishri Pershad, who was insane, with Girjabati, the mother of the two daughters, was invalid, and that they were not begotten by him.

"The District Judge found that the daughters were the legitimate offspring of Ishri Pershad, but that his marriage with their mother Girjabati was invalid for two reasons: *first*, that Ishri Pershad was insane at the time and could not contract a valid marriage, and *secondly*, that the marriage ceremonies were defective and invalid. He, therefore, granted letters of administration to the cousins Mouji Lal and

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Baburam and dismissed the daughters' applications. Against his decision the daughters have now appealed in case No. 23 and their appeals are No. 166 and 235 of 1903. Chandrabati has preferred an appeal against the Judge's decision in her own case No. 18, but Lagan Dai has not appealed against the dismissal of her application No. 31. The daughters were arrayed against each other in the lower Court, but have made common cause against the cousins.

"The facts of the family-life are these:—Ishri Pershad lost his first wife and two children almost at the same time. The District Judge has found that they died in Chait 1263 F.S., *i.e.*, in March-April, 1856; that their loss so affected Ishri Pershad's mind that he became insane. These findings have not been contested in these appeals. Ishri Pershad soon afterwards married a second wife, Girjabati, daughters of one Durga Dayal; and the District Judge has found that this marriage took place in Phagun 1264, *i.e.*, February-March 1857. The daughters have not seriously contested this finding and we see no reason to differ from it. Girjabati gave birth to these two daughters, and though the cousins asserted that they were not the offspring of Ishri Pershad, the District Judge has found that they are legitimate, and this finding has not been controverted before us.

"The only questions, then, which have been argued before us are two, namely, *first*, whether the marriage with Girjabati was invalid because Ishri Pershad was absolutely insane at the time, and because no valid ceremony was performed and therefore whether the daughters are legitimate children; and, *secondly*, whether they are fit persons to administer the estate.

"The main points which we have to consider in the first question are two: *First*, whether Ishri Pershad was absolutely insane at the time of the marriage, and, *secondly*, whether the ceremony was duly performed.

"With regard to the first point, it appears from the evidence that after an attempt by the cousin Mouji Lal, to have Ishri Pershad declared insane in 1873, was set aside by this Court on the ground of irregularity, the District Judge declared him insane, and appointed his wife Girjabati to be guardian of his person in 1877. It is also clear from the evidence that the sudden death of his wife and children preyed on Ishri Pershad's mind and was the cause of his becoming insane; and the question arises whether the insanity began before or after the second marriage. Girjabati made an application to the Collector (Ex. M.) on the 13th of May 1857, stating Ishri Pershad has recently become insane; and her father, Durga Dayal, who was managing the estate on her behalf, stated in a pottah, Exhibit B, granted in September, 1859, that he himself had been appointed under a general power of attorney, dated the 6th of April 1857: so that Ishri Pershad was plainly considered *insane* at that time. Since the second marriage took place, only about a month before April 1857, I think, he could not have been completely sane at the time of that marriage. It is necessary, however, to decide what was the character of his mental unsoundness then, for while the daughters do not admit any insanity, the cousins assert that

he was 'absolutely mad then, and was kept in confinement from the time of the marriage. They have adduced witness to prove this, but I think, their statements are exaggerated and tutored. Twenty years' treatment of that harsh kind, if he had been absolutely mad and also violent or dangerous, would not have improved his mental condition, yet when he was examined by a Munsif in the Lunacy Proceedings in 1877, his statement indicates no violence, but simply that he was talkative and subject to some foolish hallucinations. That kind of mental unsoundness appears to have been the form his insanity took, and it was a natural result of the severe grief he had undergone on the loss of his first wife and children. Its first stages would be marked by mental depression and weakness, which would not have made him incapable of knowing what he was doing. Hence, I think, that that was his mental condition at the time of the second marriage, and that he was not incapable of understanding the ceremony. He would be quite capable of accepting the new wife and assenting to the marriage and the statement that the second marriage was arranged in the hope that it might have a beneficial effect on him, may be taken in a perfectly good and honest sense. Upon this finding, it is not necessary for me to consider the elaborate arguments which have been addressed to us by both parties whether a marriage contracted by a really insane person, is or is not invalid according to Hindu Law.

"With regard to the second point, the cousins assert that the marriage was forced on Ishri Pershad by Girjabati's father, because she had then passed the ordinary marriage age, that he was carried off to her father's house for the marriage, that the ceremony was a mere pretence and that the essential incidents of it were not observed. They have adduced evidence to support these assertions, but I do not think it trustworthy. Some of the witnesses were mere boys at that time who could not have been expected to notice such formal incidents carefully. All the witness speak to a number of details and defects in the proceedings which it is impossible that they could now remember after a lapse of about forty-five years, for there was nothing so special in the circumstances or in the subsequent married life of Ishri Pershad and Girjabati as to impress such particulars on their memories. The part ascribed to the Mahomedan, Dhuman Mian, is incompatible with Hindu custom. I have no doubt that these witnesses have been tutored and their descriptions are unworthy of credit. On the other hand, the social position Ishri Pershad and Girjabati, and the estimation in which they were held for years afterwards, entirely negative the story put forward by these witnesses. There was no commotion in the caste at that time or afterwards. Ishri Pershad and Girjabati always lived together as husband and wife; several children were born; the daughters when marriageable were married into respectable families without the faintest imputation against their legitimacy; Girjabati was always treated as Ishri Pershad's real wife and her position was never disputed in the proceedings taken to declare him a lunatic. Parmeshwari Pershad, one of the witnesses for the cousins who has made particularly strong as-

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persions, described her as Ishri Pershad's wife in a receipt, Exhibit E, which he gave in 1887, and he twice signed Lagan Dai's name for her in her petition and her vakalutnama in 1902, in which she described herself as Ishri Pershad's daughter. If there is any truth in the imputations now made by these cousins, it is hardly credible that they did not put the imputations forward when opposing Girjabati in the matter of Ishri Pershad's insanity in 1873 and 1877. On the contrary, Mouji Lal described her as Ishri Pershad's wife in his petition, Exhibit K, in 1873. One of the cousins, Babu Ram, signed her name for her as Ishri Pershad's wife in a deed, Exhibit 3, that she executed in 1877, and identified her as such when it was registered. He has not ventured to give his own deposition in this case. Moreover, the way in which these cousins have now put forward these imputations is significant. They profess to have known such facts from the very beginning, yet in paragraphs 3 and 6 of their written statement they say they have come to know of them as if only recently. We think the undoubted facts are of greater weight than the wonderful recollections of the witnesses, and that this is a case in which the presumption mentioned in *Brindaban Chandra Karmokar v. Chundra Karmokar* (1), may well be applied, namely, that all the necessary ceremonies were complied with. In fact, the whole history of the family is consistent only with the view that the marriage was a valid one. The evidence to disprove that should be strong, distinct and satisfactory: see the remarks in *Lopez v. Lopez* (2). But there is no such evidence. I, therefore, find that the marriage ceremony was validly performed.

"On these findings I hold that the daughters were the legitimate children of Ishri Pershad, and that they are entitled to get letters of administration to his estate. But since Lagan Dai's application on her own behalf was dismissed by the District Judge, and she has not appealed against that, letters of administration can only be given to Chandrabati who has appealed. We, therefore, set aside the District Judge's order and direct that letters of administration be given to Chandrabati on condition that she gives security for Rs. 3,000.

WOODROFFE J. I think that the evidence, in particular the conduct of the parties and the documents which have been referred to in the judgment of my learned brother, and also in the argument of the learned vakil for the appellant (Chandrabati), establish the marriage, and that the respondents' (Mouji Lal and Baburam) evidence is not reliable and does not establish its invalidity.

"In the petition of objection the respondents admit that some form of marriage was gone through, but the allegations against its validity are of a vague character. It was alleged that the marriage was invalid, because it took place without the performance of the necessary rites prescribed by the *shastras*, and rendered obligatory by long standing usage. The case as made out in the evidence is that absolutely no ceremonies of any kind were performed and that the marriage was one

which was brought about by fraud and force, but as to which there is no suggestion in the petition of objection of the respondents.

"The other ground upon which it is alleged that the marriage was void is that assuming that the marriage in fact took place, and was in other respects valid, it was yet invalid because Ishri Pershad was a lunatic at the time. Assuming that the marriage of a lunatic is invalid, as to which there is at any rate authority to the contrary, I agree with my learned brother in holding that it lay upon the respondents to establish that the unsoundness of mind was of such a character as to render the marriage invalid, and that there is no sufficient or reliable evidence before us from which we can come to the conclusion that the unsoundness of mind was of such character as would render the marriage invalid by reason of the fact that Ishri Pershad was incapable of accepting the bride during the marriage ceremony and of understanding what was going on."

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The appeal was accordingly allowed.

On this appeal,

E. U. Eddis, for the appellant, contended that Ishri Pershad was rightly held on the evidence to have been insane at the time of his marriage; and that by reason of such insanity his marriage was invalid according to Hindu law. Reference was made to *Bodhnarain Singh v. Omrao Singh* (1); and *Hancock v. Peaty* (2). The lower Courts have both held that Ishri Pershad was insane; the only question was whether his insanity was sufficient to invalidate the marriage. The District Judge had rightly held in the evidence that the marriage ceremonies were not properly performed, and that the marriage was consequently invalid for that reason also; that decision had been wrongly reversed.

Ross and *G. A. H. Branson*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal against two decrees of the Calcutta High Court, dated the 11th April, 1905, which reversed certain decrees of the District Judge of Bhagulpur.

(1) (1870) 13 Moo. I. A. 519, 527. (2) (1867) L. R. I. P. & D. 335, 340

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The whole proceedings arise out of some conflicting applications for the grant of letters of administration to the estate of one Ishri Pershad, who died on the 31st July, 1902. In the present appeal the only claims in question are those of the respondent Chandrabati, alleged to be a daughter of the deceased, and that of the appellants, who base their claim on their position as somewhat distant agnates. It is admitted that the agnates are entitled if Chandrabati is not. The question therefore is, whether Chandrabati and a sister of hers, who is not a party to this appeal, are daughters of Ishri Pershad, and that again depends upon whether he was married to their mother Girjabati.

On that question the Courts in India have differed, the District Judge deciding against the marriage, and the High Court in favour of it.

Their Lordships are of opinion that the view taken by the learned Judges of the High Court is correct.

In the judgment of Partiger, J., it is clearly and concisely shown that from the time of the alleged marriage Ishri Pershad and Girjabati were recognised by all persons concerned, as man and wife, and so described in important documents and on important occasions. Their daughters were respectably married as would be natural in the case of legitimate children; and these facts following upon a ceremony of marriage which undoubtedly took place, though its validity is attacked, afford an extremely strong presumption in favour of the validity of the marriage and the legitimacy of its offspring.

On two grounds it is sought to impugn the efficacy of the marriage. It is said, first, that the alleged husband was at the time completely insane, so much so as to be incompetent to enter into a marriage.

Their Lordships agree with the learned Judges of the High Court in thinking that, to put it at the highest, the objection to a marriage on the ground of mental incapacity must depend on a question of degree, and that in the present case the evidence of mental infirmity is wholly insufficient to

establish such a degree of that defect as to rebut the extremely strong presumption in favour of the validity of marriage.

The second ground of attack upon the marriage rested upon the allegation that the forms and ceremonies necessary to constitute a valid marriage had not been gone through on the occasion in question.

On this point also the opinion of the learned Judges of the High Court was in favour of the marriage, and their Lordships think, rightly. To such matters of form and ceremony the established presumption in favour of marriage undoubtedly applies.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellants will pay the costs of the respondent Chandrabati, who alone appeared in the appeal.

'Appeal dismissed.

Solicitors for the appellants 1 and 2: *Theodore Bell & Co.*

Solicitor for the respondent Chandrabati: *W. W. Bor.*

J. V. W.

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ORIGINAL CIVIL.

Before Mr. Justice Harington.

1911
June 9.

MOZELLE JOSHUA

v.

SOPHIE ARAKIE.*

Jewish Law—Custom—"Ketubah"—Marriage settlement—Charge on husband's property—Priority—Intestacy—Rights of Wife in event of a Divorce.

A *ketubah* does not create any charge in favour of a widow against her deceased husband's estate. It gives a right enforceable by an innocent wife when she is divorced by her husband.

THIS was a suit brought by a Jewish widow to enforce her claim to a sum of Rs. 10,555, settled by way of dower under the Jewish law, in terms of her marriage contract called "*ketubah*," and for a declaration that she was entitled to that sum in priority to the other creditors of her deceased husband. The husband had died intestate; the debts exceeded the assets and the estate was being administered by the Administrator-General.

The suit originally came on for hearing on the 17th of June, 1909, but was dismissed on the ground that the claim should have been brought in certain administration proceedings then pending.

The plaintiff appealed from that decree, and the Appellate Court remanded the case to be heard and decided on the merits.

The case finally came on for hearing on the 9th of June, 1911.

Mr. C. C. Ghose (with *Mr. A. N. Chaudhuri*), for the plaintiff. The *ketubah* creates a valid charge on the husband's estate.

* Original Civil Suit No. 974 of 1908.

Mr. Hyam, for the defendant. This Court has no jurisdiction to administer Jewish law: *Musleah v. Musleah* (1). The document in question should be construed according to the law of British India. The domicile of the deceased being British India, the law of matrimonial domicile should apply in construing marriage settlements: *Dacey on Conflict of Laws*, 2nd Ed., pp. 510, 511. The *ketubah* is generally understood to be necessary to give validity to marriage; it is a part of the religious ceremony. The recitals are not true in fact, and the figures are fictitious; it is no evidence of any declaration of trust.

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Mr. J. E. Bagram, for the Administrator-General. The document is vague and cannot be said to constitute any declaration of trust.

Mr. A. N. Chaudhuri, in reply. The *ketubah* creates a valid charge. It is not necessary to have a writing to create a pledge, nor is delivery necessary: *Shrish Chandra Roy v. Mungri Bewa* (2).

HARINGTON J. The plaintiff is the widow of a gentleman, A. R. Joshua, and she asks for a declaration that a sum of Rs. 10,555 constitutes the first charge on the estate of her deceased husband, and that sum is due to her in priority to the sums due to all the other creditors. The estate is being administered under the direction of the Court and the liabilities exceed the assets. Now to make good her claim to this charge on the estate of her husband, the lady relies on a document which was executed at the time of her marriage. The document has been described as a *ketubah*, and it is alleged by the plaintiff that it has the effect of creating in her favour the charge which she asks to have declared on her husband's estate. She supports her claim further by a number of gentlemen of the Jewish persuasion, who have come to say what effect this document has amongst their people. I have very great doubt as to whether the evidence they give is, strictly speaking, admissible.

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Now before dealing with the witnesses, it becomes necessary to examine the document itself and see how far it bears out the plaintiff's contention that it creates a charge enforceable in her favour on her husband's death on his estate. The defendant's case is that this is an ancient form, the signing of which is part of the ceremony in every Jewish marriage, and it is not intended to create any liability enforceable against the husband's estate, but only to provide a sum of money, which should be payable to the lady, in case the husband should divorce her when she herself had not been guilty of misconduct. Now the document in question is singular in its appearance and in its form, it is certainly archaic. In it the husband says he allows endowment from his money to the extent of 100 silver and he undertakes to give food and clothing and other requirements of the lady, but then he states "that she brought to her husband ornaments of gold and silver and dresses, etc., totalling to "Rs. 5,000, which he has accepted, and wrote upon himself "(sic) on the former, and the latter also, in all Rs. 5,000, and "he further agreed to add out of his money an addition on "the principle of the edict, Rs. 455 in all, together with the "endowment, additions, and gifts, Rs. 10,555, and Mr. Aaron "acknowledged that the abovementioned sums are received "and accepted, by him and under his command, and he acknowledged that the said sums are as but to him, and he "possessed the same, and like the trade of goat and iron, should "it increase and decrease, will be sustained by him, and accordingly the said Mr. Aaron told us, that the security and "responsibility of this edict, the endowment and the addition "which are stipulated for her, accepted and agreed by me and "my heirs after me, from all my properties and also moveable "and not moveable will be security and pledge to realize from "the best, etc."

Now in trying to ascertain whether this is an archaic form or whether, as the plaintiff says, this is a statement of a real transaction, I think it is important to say how far the statements made in it are in fact true. Is there any evidence that

the lady brought to her husband ornaments of gold and silver totalling in all Rs. 5,000? At the previous hearing the lady stated that when she was married she had no property of her own, and that she had a few ornaments of gold and silver, which she says she got from her father and none from her former husband, as his were left for her daughter. She said, "I made over those ornaments to him. They were worth about Rs. 1,500. Beyond the ornaments I had only some furniture." But when she is recalled for the purpose of further examination in the present hearing, the lady says she did take to her husband Rs. 5,000 in silver and jewellery. The result is that the lady makes two contradictory statements, one at the present hearing and the other at the previous hearing. I should have hesitated to accept it if she had stated in the earlier statement that she had brought to her husband ornaments of gold and silver totalling Rs. 5,000, without some particulars, but there was no statement with regard to it at the previous hearing. There were no particulars of the ornaments, and the lady has made two contradictory statements with regard to her property. On that evidence, it has not been established that the lady brought Rs. 5,000 or any other sum to her husband on the occasion of her marriage.

Then with regard to Rs. 555, it has not been asserted by any one on behalf of the plaintiff that that sum was ever added to any money brought in by the lady. On the contrary the witness, Mr. Cohen, who was called on behalf of the plaintiff, says that the amount of Rs. 555 does not represent any actual sum but it is a fictitious figure inserted for the purpose of avoiding having a number of noughts in the figure which is written. The result is, that on the document itself part of the figures, presented, is proved to be fictitious, and that the lady brought to her husband the amount of Rs. 5,000 has not been proved, and there is no evidence as to whether the deceased was in possession at the time of marriage of Rs. 5,000, so that of the statements in the document some have not been proved and one has been shewn to be fictitious.

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Then one has to consider the evidence of the Jewish witnesses who have been called. First, there is Mr. Cohen. He says that the lady has certain claims on the husband in consideration of the agreement and its terms. Mr. Leniardo, who was called on the previous hearing, puts the lady's rights rather higher than any one else. He says that the document is a document of marriage-settlement, and that the amount should be paid either by the husband in his lifetime, or after his death. Then comes Mr. Arakie, who was the last witness called for the plaintiff, and he only expresses what is the belief of his countrymen; and according to their belief this *ketubah* constitutes a charge on the estate of her husband, and then he further says that if the husband is insolvent the wife is to go without it. His evidence, if it is true, would be destructive of the plaintiff's case, because she claims to be given priority over all the other creditors of the deceased. Then there was another gentleman, who was called just before Mr. Arakie and that is Mr. David Ezra, and he says that the lady gets her rights under this document, and they arise in the case of divorce and do not come into operation during the husband's lifetime. He says that a sum of money is inserted in all these documents. This amount is put for the purpose of indicating the rank and position of the parties, rather than for any other reason; and he says that he has never heard of a Jewish widow asserting her rights to the *ketubah* money. The plaintiff has referred to a book, under the Evidence Act, which supports the plaintiff's contention as to the effect of the *ketubah* under the Jewish law. Now that is all the evidence which the plaintiff can rely upon to support her claim. The defendant relies on the evidence of the persons who were called at the earlier hearing and whose views are that the money can only be claimed in the case of divorce. Now the evidence of the gentlemen, who have been called by the plaintiff, when it comes to be examined, does not really establish her claim, because they only refer specially to what in their opinion is the effect of the document. It is conceded and, indeed, has been spoken to by almost every witness, that the execution of the document of this

nature, has been customary amongst the Jewish people, from time immemorial, as a portion of the wedding ceremony, and no witness has ever heard of a case in which it was sought by any Jewish widow to assert that that document created a liability in her favour on the estate of her deceased husband. I confess that that part of the evidence presses me very strongly, and I am unable to believe, that if this document was really effective to give the rights to the wife which the plaintiff says it does, no case should ever have arisen in which the claim was made or established.

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There is evidence that the *ketubah* gives a right enforceable by an innocent wife when she is divorced by her husband, but the evidence in this case does not, to my mind, establish that she has any rights under it against her deceased husband's estate, and my view is strengthened by the evidence that when a marriage is contracted by Jews of wealth and position, although the sums inserted may be larger, yet for the purpose of giving the widow, the rights to her husband's property, an ordinary marriage-settlement is executed, and parties never treat the provisions in the *ketubah* as giving any real rights. On the whole case, therefore, there must be judgment for the defendant and the grounds on which I base my judgment are (i) I do not believe the *ketubah* is intended to create any charge, because the statement of facts in it, as to the money brought in by the lady, appears to be without any foundation; and (ii) because, while all the witnesses are agreed that it gives rights to the wife in the event of a divorce, every witness says that no case has ever occurred in which it was contended that it gave any right to the widow until the present suit; and, (iii) because there is evidence that, where it is desired to settle the property on the wife notwithstanding the existence of a *ketubah*, a marriage-settlement is executed.

I think that if the widow had been so convinced that the *ketubah* created a charge, she would, in the first instance, have made her claim as against her deceased husband's estate.

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The suit must be dismissed and the plaintiff must pay costs to the defendant on scale No. 2.

G. M. F.

Suit dismissed.

Attorney for the plaintiff: *N. C. Bose.*

Attorney for Mrs. Arakie: *R. Westmacott.*

Attorneys for the Administrator-Genl.: *Orr, Dignam & Co.*

CRIMINAL REFERENCE.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

1911
 June 12.

CORPORATION OF CALCUTTA

v.

HAJI KASSIM ARIFF BHAM.*

Bustee land—Owner of bustee—Receiver—Liability of actual owner to carry out bustee improvements when his estate is under a Receiver appointed by the High Court—Calcutta Municipal Act (Beng. Act III of 1899) s. 408.

When a notice under section 408 of the Calcutta Municipal Act has been served on the actual owner of an estate in the hands of a Receiver appointed by the High Court, he is liable under the section as such, and not the Receiver, to carry out the requisitions made therein. It is incumbent on the owner in such a case to request the Receiver to comply with the notice, after taking the directions of the Court, and on the latter's failure to do so he should himself apply to the High Court making the Receiver a party. If the Court refuses the application, the owner would be enabled to satisfy the Magistrate that he had used all diligence to carry out the requisitions, and in the event of a conviction the penalty would be merely nominal. If the owner is helpless in the matter the General Committee may proceed under the section against the occupiers.

Parker v. Inge (1) referred to.

A Receiver appointed by the High Court is not the "owner" of the premises he holds as such, nor is he an "agent or trustee" within the definition of the term in section 3 (32) of the Calcutta Municipal Act.

Fink v. Corporation of Calcutta (2) followed.

* Criminal Reference, No. 2 of 1911, by N. C. Ghatak, Municipal Magistrate of Calcutta, dated May 3, 1911.

(1) (1886) 17 Q. B. D. 584.

(2) (1903) I. L. R. 30 Calc. 721.

THE facts of the case are as follows. One Haji Kassim Ariff was, on the 14th November, 1910, served with a notice, under section 408 of the Calcutta Municipal Act, calling upon him, as owner of the bustees No. 7 and 7/1, Wellesley Street, to execute within three months certain improvements as specified in Schedule A of the report attached to the standard plan. It appeared that his estate was then under a Receiver appointed by the High Court. Haji Kassim did not object to the notice, nor did he take any steps to induce the Receiver to comply with it, nor did he move the High Court to direct the latter to do so, but failed to carry out the requisitions made on him. He was prosecuted in consequence before the Municipal Magistrate, and an objection was then urged on his behalf that he was unable to comply with the terms of the requisition as his estate was in the hands of the Receiver. The Assistant Solicitor to the Corporation contended that Haji Kassim was, as owner, liable under section 408 of the Act, and that he should have moved the High Court to direct the Receiver to carry out the requisitions contained in the notice. The Magistrate thereupon made a reference to the High Court, under section 432 of the Criminal Procedure Code, for the decision of the question set forth in the judgment of the High Court.

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Mr. Mehta (with him *Babu Debendra Chandra Mallick*), for the Corporation. In *Fink v. Corporation of Calcutta* (1), it was decided that a Receiver of the Court is not the "owner" of the premises within the definition of the term in the Municipal Act, nor is he the trustee or agent of the owner. The proper person to be served with the notice is the actual owner, and it is incumbent on him to move the Receiver or the Court, which appointed the Receiver, to enable the Receiver to comply with the notice of the Corporation: see *Parker v. Inge* (2).

CASPERSZ AND SHARFUDDIN JJ. The question of law referred for the opinion of this Court, under section 432 of the Criminal Procedure Code, is "whether the accused is bound to

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move the High Court for taking steps for the carrying out of the requisitions of the notice under section 408 of Bengal Act III of 1899, or whether the Corporation should have, with the leave of the High Court, served the notice under section 408 upon the Receiver."

The estate of the accused Haji Kassim Ariff Bham is in the hands of a Receiver appointed by this Court. It is beyond dispute that some one must carry out the requisitions under the Act. It was held in *Fink v. Corporation of Calcutta* (1), that the Receiver is not the "owner" of the premises he holds as Receiver, within the definition of the term as contained in the Municipal Act, and that he is not an agent or trustee in that behalf. It follows that the actual owner, Haji Kassim Ariff Bham, is the only person liable, *as owner*, to carry out the requirements of the law. The learned counsel for the Corporation has cited section 613 of the Act which affords relief to agents and trustees. It is sufficient to repeat that the Receiver is not a person falling within that category.

The real question is whether the owner or the Receiver ought to have moved this Court for directions to carry out the work. In our opinion, as the notice was duly served on the owner, and as the Receiver cannot be lawfully served with such a notice, it was incumbent on the accused, Haji Kassim Ariff Bham, to request the Receiver to comply with the notice, after taking the directions of this Court, and, on his failure to comply, to apply to the High Court, making the Receiver a party to his application. A similar liability was imposed on the owner as against his tenant in a case under the English Public Health Act, 1875, namely, in *Parker v. Inge* (2). Applying the reasoning of the learned Judges in that case, if we suppose that this Court had refused the application of the accused, the latter would be entitled to satisfy the Magistrate that he had used all due diligence to carry out the requisition, and, in that event, if a conviction were had, the penalty would be nominal. On the same supposition, if the owner were helpless in the matter, the General Committee might, under sec-

(1) (1903) I. L. R. 30 Calc. 721.

(2) (1886) 17 Q. B. D. 584.

tion 408 of the Act, proceed against the occupiers of the premises. We offer these observations because, as it seems to us, ample machinery exists, even in the present complication, for the carrying out of the improvement of *bustees*. In this case, the owner did nothing except plead his inability. That is not enough.

Let a copy of our order be transmitted to the Municipal Magistrate who will now proceed to dispose of the case conformably thereto.

E. H. M.

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P.C.*

June 13.

[On appeal from the Chief Court of Lower Burma, at Rangoon.]

Appeal—Order in execution of decree—Order refusing decree-holder permission to bid at sale in execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 2, 244 cl. (c), 294 cl. (16), 540, 588 and 617—Act VII of 1888, s. 75—Revision where no appeal lies.

No appeal lies from an order refusing an application by a decree-holder for permission to bid at a sale in execution of a decree.

Jodoonath Mundul v. Brojo Mohun Ghose (1) approved.

APPEAL from two orders (8th and 20th September, 1909) of the Chief Court of Lower Burma, made in proceedings in execution of a decree, the former of which orders rejected an appeal from an order (25th August, 1909) of the District Judge of Amherst, and the second refused an application for revision of the same order of the District Judge.

The decree-holder was the appellant to His Majesty in Council.

* *Present*: LORD MACNAGHTEN, LORD SHAW, LORD MERSEY AND MR. AMER ALI.

(1) (1886) I. L. R. 13 Calc. 174.

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The decree in execution of which the above-mentioned orders were made was one in a suit brought by the appellant as plaintiff, against the respondent as administratrix of the estate of one Maung Shu Hman deceased, claiming Rs. 103,252-8 for money lent to the deceased, and a declaration of lien for the said amount on 33 promissory notes, which had been deposited with the appellant by the deceased as security. The defence to the suit is not now material. The Judge of the District Court of Amherst gave judgment in favour of the appellant for the amount claimed with costs, and ordered the sale of the promissory notes in satisfaction of the decree.

On 17th July, 1908, the appellant applied to the District Court of Amherst for the sale of the promissory notes. The respondent claimed that as the notes were all made and payable in the Kareuni District (not in the jurisdiction of the Amherst Court) the sale should take place at Loikaw, the chief town of the District of Kareuni, and that the appellant should not be allowed to bid at the sale either directly or indirectly. The appellant stated that as the notes were the only securities he had for the payment of the debt to him, he would lose part of it if they were sold below their face values, and that he ought to be permitted to bid at the sale.

On 25th August, the Court ordered that the sale should be held in the jurisdiction of the Amherst Court after six months had expired but with notice to be published in the District of Kareuni, and that the appellant should be prohibited from bidding. This last part of the order purported to be made under section 294 of the Civil Procedure Code, 1882.

On September 5th, 1908, the appellant filed a petition for revision of the order of 25th August to the Chief Court of Lower Burma, but that Court held that his proper remedy was an appeal, and the position was amended by making it one for an appeal the main ground being that in forbidding the appellant to bid at the sale the Court acted with material irregularity and contrary to the practice of the Courts. The Chief Court, however, held that an appeal did not lie from

the order of the District Court, referring as an authority to the case of *Jodoonath Mundul v. Brojo Mohan Ghose* (1), where it was decided that section 588, clause (16) of the Civil Procedure Code allowed an appeal only against an order under section 294 confirming, or setting aside or refusing to set aside, a sale, but not against an order refusing a decree-holder permission to bid at a sale.

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On 6th September, 1909, the appellant applied to the Chief Court for review and revision of the order of the District Judge of Amherst, dated 25th August, 1908, on substantially the same grounds as those on which the appeal had been based, but on 20th September the Court rejected the application holding that there was "no case for the exercise of revisional powers."

The Chief Court on 18th July, 1910, granted a certificate that the case fulfilled the requirements of section 596 of the Civil Procedure Code of 1882 (which and not the Code of 1908, it held was applicable) and was a fit case for appeal to His Majesty in Council.

On this appeal, which was heard *ex parte*,

J. W. McCarthy, for the appellant, contended that the order refusing the appellant permission to bid at the sale was a "decree" within the meaning of section 2 of the Civil Procedure Code, 1882, and an order made in execution of decree under section 244, sub-section (c), and was therefore appealable as of right under section 540. But even if it was not a "decree," it was an order made under section 294, clause (16), and by section 588 all orders made under section 294 were appealable orders; and were not limited as held by the Chief Court in the authority of *Jodoonath Mundul v. Brojo Mohan Ghose* (1), which, it was submitted, was wrongly decided. Reference was made to section 75 of Act VII of 1888, which amended the Code of 1882. The Court, it was contended, had no jurisdiction to make the order refusing the appellant permission to bid, and in so refusing it had acted with material

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irregularity, inasmuch as according to the practice of the Courts such leave was granted to the decree-holder, as a matter of course, in a case where the conduct of the sale was in the hands of the Court, and not under the control of the decree-holder. There was, too, no reason for refusing permission to bid, and the circumstances that the notes were being sold far away from the usual residences of the makers of the notes, and amongst persons who did not know the said makers, should rather have induced the Court, in order that reasonable value for the said notes might be obtained, to have allowed the appellant to bid at the sale. Even, therefore, if no appeal lay, the Chief Court should have exercised its powers of revision over the order refusing permission to bid, and should have set it aside. Civil Procedure Code, 1882, section 617 was referred to.

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The judgment of their Lordships was delivered by LORD MACNAGHTEN. Their Lordships are of opinion that the judgment under appeal is right. If the appellant had applied for leave to appeal, and his application had been refused, there could not have been any appeal. It is a matter of administration.

The point was expressly decided at Calcutta in the year 1886,* and there is no authority impugning that decision. The point was raised there, and it was decided by the High Court that no appeal lies "from an order refusing to give a decree-holder permission to purchase at a sale held in execution of a decree."

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed. There is no appearance by the respondent so that there will be no order as to costs.

Solicitors for the appellant: *Bramall & White.*

J. V. W.

Appeal dismissed.

* (1886) I. L. R. 13 Cal. 174.

APPELLATE CIVIL.

Before Mr. Justice Woodroffe and Mr. Justice Carnduff.

RAVANESHWAR PRASAD SINGH

v.

CHANDI PRASAD SINGH.*

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March 29.

Hindu Law—Legal Necessity, how to be made out—Onus of proof of legal necessity as affected by lapse of time—Court of Appeal, power of, to make any order to meet justice—Civil Procedure Code (Act V of 1908), o. XLI, r. 33.

A property known as *taluk C* belonged to G, a Hindu. After G's death, there was litigation regarding the succession. D, the father of the plaintiff, T C, was a party in that litigation. The mother of G was held entitled to succeed. D then brought a suit claiming the estate and sought to set aside an alienation by G's mother of a portion of the estate in favour of M G. The Judicial Committee held finally in that suit that D's suit was barred by *res judicata*, and refused to make any declaration regarding the alienation in the life-time of G's mother. Before her death, G's mother sold the entire estate C to M. G. After her death, T C, the son of D, and two other persons sued M G for setting aside the alienations on the allegation that T C was the eldest male member in the eldest line, and as such, was entitled to the property by virtue of the rule of lineal primogeniture governing succession in the family. The plaintiffs prayed therein for a decree in favour of T C or, in the alternative, in favour of one or more of the plaintiffs. The first Court decreed the claim of T C. On appeal to the High Court by the defendant:

Held, that, if one or other of the plaintiffs was entitled to succeed, the suit should not be dismissed simply, because the first of the plaintiffs alone had failed to make out a title, particularly when, by so dismissing the suit, the right of the co-plaintiffs (who, if the first plaintiff were not joint with the last male holder would, on failure of the first plaintiff's case, be entitled) would be thereby barred; and that, in such a case the Appellate Court could exercise the power provided for in the Code of Civil Procedure, o. XLI, r. 33.

Held, also, that lapse of time did not affect the question of onus of proof regarding legal necessity, except in so far as it might give rise to a presumption of acquiescence or save the alienee from adverse inferences arising from the scanty proof which might be offered.

Held, further, that in order to justify legal necessity, it must be shown that the expenses could not have been met from the income of the property in the widow's hands, and that they were reasonable.

* Appeal from Original Decree, No. 193 of 1909, against the decree of Hem Chandra Mukerjee, Subordinate Judge of Monghyr, dated April 14, 1909.

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Held, lastly, that payment of full value for the property did not of itself justify a sale by a Hindu widow in the absence of legal necessity.

APPEAL by the defendant, Maharajah Sir Ravaneshwar Prasad Singh Bahadur.

This appeal arose out of a suit for possession, in favour of plaintiff No. 1, of certain properties, after declaration of title according to the family custom of lineal primogeniture, and also according to the deeds of release executed by the plaintiffs second party. It was further prayed in that suit that the transfers of certain properties by the mother of the last male holder of the estate in favour of the defendant first party, might be declared to be invalid.

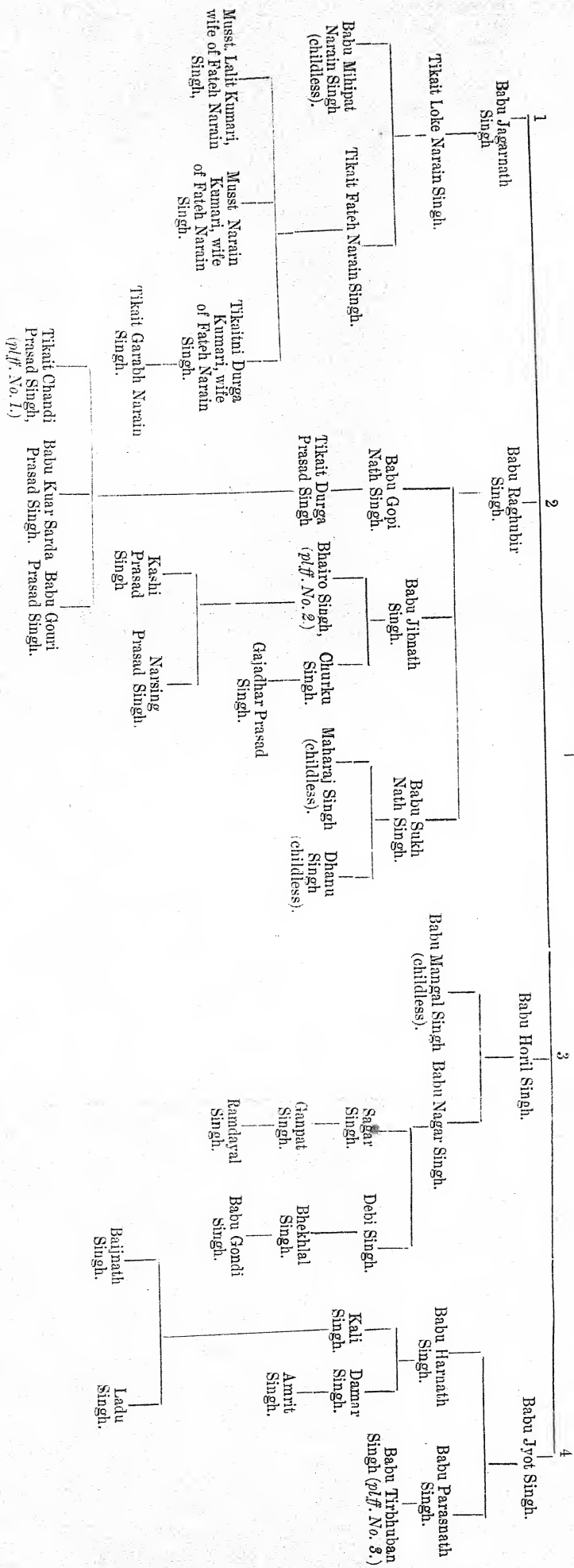
The defendant first party, *viz.*, the appellant before the High Court, alone contested the suit. He contended, *inter alia*, that (i) the plaintiff first party, Tikait Chandi Prasad Singh, was not the heir to the estate; (ii) that alienations in favour of the defendant first party were all made in good faith and for proper, legal and valid necessity and after proper inquiry and on belief of valid and legal necessity; and (iii) that, even if the alienations be declared invalid, the plaintiffs, nor any one of them, would be entitled to the reliefs claimed by them without paying for the sums, which form a valid charge on the aforesaid properties, inasmuch as the sums which were advanced from time to time by means of those transfers had been applied for the benefit and valid necessities of the estate, and the defendant and his ancestor had to spend large sums of monies from time to time for the improvement and preservation of the properties in suit.

The Subordinate Judge decreed the suit fully in favour of the plaintiff No. 1, on condition of his paying Rs. 2,800 and Rs. 38,134-5-4 to the contesting defendant, the said amounts to be set off against *mesne-profits*, to be ascertained afterwards. The claim of the other plaintiffs was dismissed.

The defendant first party thereupon appealed to the High Court.

[The annexed genealogical tree will make the position of the parties clear.]

TILKAT DHARAM NARAIN SINGH.



Dr. Rash Behary Ghose (with him *Babu Umakali Mukherji, Babu Golap Chandra Sarkar, Babu Jogendra Chandra Ghosh* and *Babu Kulwant Sahay*), for the appellant. Chandi Prasad is the only plaintiff, who has got a decree in his favour. He has, however, no right to succeed unless he proves that lineal primogeniture governs the rule of succession in the Chakai family. If he fails to prove it, either he or both of the other two plaintiffs, would have the right of suit. But they have not appealed, and the decision of the Sub-Judge is final so far they are concerned. Primogeniture cannot prevail in the family. Formerly the Chakai estate was a *ghatwali*, it is true. But the same incident of primogeniture would not attach to the estate after emancipation from *ghatwali* services: *Ramakanta Das Mohapatra v. Shamanand Das Mohapatra* (1). Even if there were primogeniture, it would not follow that lineal primogeniture would govern the rule of succession. In India there is no presumption in favour of lineal primogeniture. It prevails in countries in a settled state, but India was not in such a state during the later Mahomedan rule, when these estates were created. The plaintiff must prove by clear evidence that there is *in the family* an ancient and *well-established* customs of lineal primogeniture. This he has failed to establish.

The decision in the former suit between Durga Kuari and Durga Prasad operates as *res judicata*.

The alienations sought to be set aside were made long ago. Owing to lapse of time, the onus to prove necessity is upon the reversionary heir: *Chowdhry Herasutoollah v. Brojo Soondur Roy* (2).

The gift in favour of Ahlad Pandey was for a pious and religious purpose and as such it is binding on the reversionary heir: see *Viramitrodaya*, p. 141, Edition of Babu Golap Chandra Sarkar, 2nd Ed., 1907; *Ram Kawal Singh v. Ram Kishore Das* (3), *The Collector of Masulipatam v. Cavalry Vencata Narrainapah* (4).

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(1) (1909) I. L. R. 36 Calc. 590;
L. R. 36 I. A. 49.

(3) (1895) I. L. R. 22 Calc. 506.

(4) (1860) 8 Moo. I. A. 503.

(2) (1872) 18 W. R. 77.

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Mr. S. P. Sinha (with him *Babu Jogeshchandra Roy, Babu Akshoy Kumar Banerjee, Babu Nareshchandra Sinha, Sashankajeeban Roy and Babu Hariharprasad Singh*), for the respondents. The question of lineal primogeniture is immaterial. The plaintiffs Nos. 2 and 3 are respondents in this appeal. If the Court finds that the plaintiff Chandi Prasad should not get a decree, it can, under o. XLI, r. 33, of the Civil Procedure Code, pass a decree in favour of one or both on the plaintiffs, who are respondents. Further the release by the plaintiffs Nos. 2 and 3 in favour of the plaintiff Chandi Prasad operates as a conveyance. The Chakai estate was not *ghatwali*, although the family held a number of *ghatwali* estates.

There is no question of *res judicata*. Chandi Prasad does not claim through his father, but he claims directly from the last male holder.

The question of custom was left open by the Privy Council in the former suit. Impartible estate is necessarily joint estate of the family. This is clear from the decisions of the Privy Council in the former suit: *Doorga Persad Singh v. Doorga Konwari* (1); see also *Sivagnana Tevar v. Periasami* (2), *Jogendra Bhupati Harrochundra Mahapatra v. Nityanand Man Singh* (3), *Gur Pershad Singh v. Dhani Rai* (4), *Laliteshwar Singh v. Rameshwar Singh* (5). Durga Prasad was therefore joint in estate with the husband of Durga Kuari. The custom of lineal primogeniture has become attached to the family. Custom may be proved by a well-known tradition in the family.

The onus to prove necessity is upon the alienee: *Mahomed Ashruf v. Brijessuree Dassee* (6), *Bhagwat Dayal Singh v. Debi Dayal Sahu* (7). The alienee must show that there were no funds sufficient to meet the demands on the estate: *Roy Radha Kissen v. Nauratan Lall* (8), *Charu Chunder Dutt*

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| (1) (1878) I. L. R. 4 Calc. 190; | (4) (1910) I. L. R. 38 Calc. 182. |
| L. R. 5 I. A. 149. | (5) (1909) I. L. R. 36 Calc. 481. |
| (2) (1878) I. L. R. 1 Mad. 312; | (6) (1873) 19 W. R. 426. |
| L. R. 5 I. A. 61. | (7) (1908) I. L. R. 35 Calc. 420; |
| (3) (1890) I. L. R. 18 Calc. 151; | L. R. 35 I. A. 48. |
| L. R. 17 I. A. 128. | (8) (1907) 6 C. L. J. 490. |

v. *Sarat Chunder Singh* (1). Creditor must prove the particulars of the transaction and its justification: *Somasundara Tambiran v. Sakkarai Pattan* (2), *Hurro Nath Rai Chowdhri v. Randhir Singh* (3), *Maheshwar Baksh Singh v. Ratan Singh* (4).

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As regards gifts for pious purposes, see *Puran Dai v. Jainarain* (5), *The Collector of Masulipatam v. Cavalry Vencata Narrainapah* (6), *Runjeet Ram Koolal v. Mahomed Waris* (7).

The so-called gift to Ahlad Pandey was, however, really a bribe given to him.

Cur. adv. vult.

WOODROFFE AND CARNDUFF JJ. The first plaintiff claims an estate called *taluk Chakai*, originally the property of one *Tikait Dharam Narain Singh*. He claims to be the great great grandson of *Raghubir Singh*, the second son of *Tikait Dharam Narain Singh*. The last male holder of the property was one *Tikait Garabh Narain Singh*, who died while a minor and who was the great grandson of *Jagarnath Singh*, the eldest son of *Tikait Dharam Narain Singh*. A pedigree is attached to the pleadings. It is alleged that the family is governed by the *Mitakshara* and that the property is impartible. *Tikait Fateh Narain*, the father of *Garabh Narain*, died on the 18th April, 1863, leaving three wives. A posthumous son was born in July 1863, *Garabh Narain* above mentioned. On the latter's death his mother, *Tikaitni Durga Kumari*, succeeded as his heir and died on the 15th May, 1907. During her life time certain alienations were made in favour of the predecessor of the defendant, the Maharajah of *Gidhour*. The first plaintiff claims to be entitled to these properties on the ground that *Durga Kumari* had a limited interest only and that the transfers were not for legal necessity and were not transfers of the estate itself, to which he

(1) (1910) 12 C. L. J. 537..

(2) (1869) 4 Mad. H. C. 369.

(3) (1890) I. L. R. 18 Calc. 311;

L. R. 18 I. A. 1.

(4) (1896) I. L. R. 23 Calc. 766.

(5) (1882) I. L. R. 4 All. 482.

(6) (1861) 8 Moo. I. A. 529;

2 W. R. P. C. 61.

(7) (1873) 21 W. R. 49.

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lays claim on the ground that lineal primogeniture applies to this estate and that he is the eldest representative of the eldest line of Tikait Dharam Narain Singh.

The first plaintiff associated with himself the second and third plaintiffs, Bhairo Singh and Tirbhuban Singh. These persons are nearer in descent to Dharam Narain Singh; but they are members of junior lines, and the plaintiff alleges that they have executed deeds of relinquishment, in favour of the first plaintiff, of any right they might claim, though in fact they had no right except to maintenance. The suit commenced on the 6th March, 1908, and on the 24th August, 1908, Tirbhuban asked that his name should be removed from the category of plaintiffs, and he was accordingly made a defendant on the 25th August. On the 18th December, 1908, he applied to be made a plaintiff again. The Court has held that lineal primogeniture applies, that according to this rule the first plaintiff is entitled to the estate, and that the alienations were not made for legal necessity. Decree has, however, been given him conditionally on his paying certain sums, amounting to Rs. 40,000 odd, which the lower Court holds are a charge on the estate. The defendant Maharajah has appealed, and the two questions which we have to decide are: (1) whether the first plaintiff, Chandi Prasad Singh, is the heir-at-law, and (2), if so, whether the transfers under which the Maharajah claims are binding on the inheritance.

On the 22nd April, 1863, after Fateh Narain's death and before the birth of his son, his three widows applied to the Collector for the registration of the estate in their names. Before such application and the birth of the son there had been an agreement between the widows that the three should hold the estate.

Against this application, the first plaintiff's father, Durga Prasad Singh, put in a petition of objection, dated 21st May, 1863, which is of some importance. He appears there to have alleged that the application by the widows was adopted to deprive him of his rights, that as the next of kin he was heir, and that he, Nagar Singh and Harnath Singh were ready to apply for mutation of names according to the usage of the family.

The objection was heard and on the 3rd July, 1863, the widows' names were directed to be entered. From an extract from the police diary of Chakai, dated 2nd March, 1866, it appears that one Kashi Nath Upadhyaya, alleging himself to be a servant of Durga Kumari, stated:—"My employer has only a brother-in-law, Durga Prasad Singh, who lives in commensality with her as her next heir, and, except the said Durga Prasad Singh, there is no other rightful heir who could look after the estates, etc. Therefore my employer has this day appointed the said Durga Prasad Singh to look after the estates and manage the court and village affairs, and afterwards she will make him her *mukhtear* and the *malik* of the entire estate with all powers. I have, therefore, come by the order of my employer to give information." This entry, it will be observed, is in conflict with the alleged statements in the petition of objection already referred to. On the 5th November, 1868, Durga Kumari brought a suit against her co-widows and Durga Prasad Singh for recovery of possession of two-thirds of the property, of which she alleged she had been dispossessed at the instigation of Durga Prasad Singh. The latter in his written statement took objection that the suit was undervalued as the *taluk* Chakai (now said to be worth ten lakhs) was worth two lakhs and the two *ghatwali* estates Rs. 50,000; and that the claim for confirmation was not entertainable, as one-third of the property was not in the possession of the plaintiff. He then claimed the estate on the ground that he was a member of a joint Mitakshara family with the last holder. No mention was made of custom. The co-widows set up an *ekrarnamah* by which all three widows were to remain in possession, and they declared that, with the consent of all of them, Durga Prasad had been installed on the *gaddi* and was about to have his name registered when the plaintiff left the house at the instigation of a servant, named Ahlad Pandey, who is mentioned in the eighth para of the plaint in this suit. In these suits both Nagar Singh and Harnath Singh intervened, claiming to be entitled to possession jointly with Durga Prasad, as alleged to have been admitted by him in the petition for mu-

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tation of names to which we have referred. They denied that he had been installed as Tikait. The Court, by its judgment dated 23rd March, 1869, holding that the plaintiff's title to sue as heir was established, stated that the next question was whether Durga Prasad was joint in food and estate with the plaintiff's husband and as such entitled to succeed by survivorship. The Court found that he was not so joint, and also that he had not received *tilak* from the widows and that the *ekrar* did not bind the plaintiff. The suit was, therefore, decreed. On appeal to the High Court the decree was, on the 5th January, 1870, affirmed.

This Court then found that the estate was not held jointly. It pointed out that the appellant had attempted to give evidence that there was a family custom excluding females, but it disallowed the raising of that issue as it had not been pleaded. Subsequently Durga Prasad brought a suit on 25th December, 1870, for possession, alleging the custom of lineal primogeniture excluding females. This suit was dismissed by the Subordinate Judge as *res judicata*, on the 29th December, 1871, and the judgment was affirmed by this Court on 6th June, 1873. This Court then held that no family usage or *kulachar*, either excluding females or giving the preferential right of succession to direct descendants or the eldest male heir, had been proved. It also held that the prior decision as between the parties established that the plaintiff had never been joint in estate with the last proprietor. An appeal was preferred by the present appellant's father against the decision of this Court to the Privy Council, which dismissed the appeal on the 17th May, 1878. The judgment of the Judicial Committee deals with two claims of the then plaintiff, the first being his claim to succeed to the estate on the death of Garabh Narain on the ground that the latter's mother was not entitled according to the Mitakshara law and the custom of the family to succeed as heiress of her son, and the second claim being for a declaration that a deed (one of those attacked in this suit), which he had executed in favour of an ancestor of the present respondent, was void as against reversionary heirs. The Judicial Committee, without going

into the facts, held that the first claim was *res judicata*. As regards the second claim the Judicial Committee, also without going into the facts, refused for the reasons stated by them to grant a declaratory decree with respect to the deed executed in favour of the present appellant's ancestor. Their Lordships while abstaining from expressing any opinion on the findings of the High Court, stated that they left it open to all parties thereafter to raise the question as to the family custom set up by the plaintiff and that their decree would not be *res judicata* as to the first and second issues of fact.

From about this date until 1907, when Tikaitni Durga Kumari died, the latter held undisputed possession of the property. The question of prior possession will be dealt with hereafter. After her death and on the 6th March, 1908, this suit was instituted challenging the validity beyond her interest of the alienations mentioned in the plaint. Paragraphs 17 and 18 of the pleadings expressly base the plaintiff's title on the existence of an alleged family custom of lineal primogeniture. A title is not put forward based on the existence of a joint Hindu Mitakshara family and therefore on the passing of the property by survivorship to the plaintiff. The Subordinate Judge does not deal with the question whether the plaintiff was joint with the last holder, but has held that, apart from the evidence and on general principle, the plaintiff is entitled to succeed, and, secondly, that the evidence establishes the existence of the family custom set up in the plaint. The title of the plaintiff having been thus established, the Subordinate Judge has held that, subject to what is hereafter stated, the existence of legal necessity for the loans and private alienations in question has not been proved, nor had it been proved that the appellant's ancestor acted upon enquiry made in good faith and representations reasonably believed as to the existence of such necessity; and that the widow's interest only passed by the Court-sale at which the appellant's ancestor purchased two annas share of the estate in dispute. The exception above mentioned to this finding is that the lower Court has held that Rs. 2,800 out of the consideration for the first *kabala*

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was for legal necessity and that the appellant was entitled to a charge upon the estate for the sum of Rs. 38,134-5-4 in respect of the transactions mentioned in the concluding paragraphs in this judgment. It is not necessary now to go into this matter, to which we will recur in dealing with the cross-objections. The Subordinate Judge therefore decreed possession to the first plaintiff (the claim of the other plaintiffs being disallowed) subject to payment of the sums mentioned. Against this decision the defendant Maharajah has appealed and the two questions we have to determine are, as we have already said, *firstly*, whether the first plaintiff is the heir-at-law and so entitled to maintain the suit, and, *secondly*, if so, are the transfers which he impugns, binding on the inheritance?

Upon the first point it is admitted that the result of the reported decisions is that, where impartible property passes by survivorship from one line to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line. But it is contended that, in order that this rule should be applied, there must be a joint family upon which the principle of survivorship may operate. It is conceded that, if the family were joint and the property impartible and the claim of the plaintiff had been based on co-parcenary, then in that case the plaintiff would be the heir-at-law. But it is contended in the first place, that the plaintiff bases the plaintiff's title on family custom and not on the ordinary law applicable to a Mitakshara joint family, and, secondly, that the first plaintiff's father was not in fact joint with the last male holder and that the decision of the High Court (5th January, 1870), in Durga Kumari's suit of 1868 that the estate was not held jointly is *res judicata*. It is then contended that the plaintiff's case must depend on the proof of the alleged family custom which he asserts, that on failure of such proof the succession would be governed by the law relating to succession to separate property, and that on the facts the first plaintiff is in this case excluded.

If then the plaintiff establishes the family custom alleged, or if he is not precluded from establishing and does establish

that his father was joint with the last male holder, then he establishes his title to sue. If, on the other hand, the family custom is not proved and the plaintiff is precluded either by *res judicata* or by his pleading from showing (or if not so precluded) does not show, that the family was in fact joint, then he fails to establish his title. There was no issue in the lower Court as to jointness. Learned counsel for the respondent has, however, substantially placed his case on the proof of the alleged custom. The first issue, therefore, is whether the family custom has been proved.

It is admitted that the family is governed by the Mitakshara. Though the judgment of the lower Court states that it was also admitted that the property was impartible and that succession was governed by custom, it has been sought to be contended here that no family custom could or did exist in the family. It is said that the estate was originally a *ghatwali* tenure, which in 1779 was settled in mokarari after resumption, the date of which is not known. It is argued, therefore, that no custom could exist, as the estate then first came into the family as prior thereto it was merely attached to the office of *ghatwal* and did not belong to the family. It is contended that, the origin of the estate being thus known, no ancient custom could be proved. The plaintiff in his deposition stated that Chakai was originally *ghatwali*, though now and from ancient times a zemindari. He says "he does not know how long ago it was *ghatwali*." The Collectorate *rubakari* of September, 1878 (Ex. R. R.), describes Har Narain as a *ghatwal*, and gives the date of settlement of the estate. The document speaks of Har Narain as *ghatwal*, but there were *ghatwalis* other than Chakai. From the judgment of the High Court of 6th June, 1873, it appears that, though the case was argued on the assumption that the estate was originally *ghatwali*, the Court was of opinion that part only of the property was *ghatwali*. Apart from the question whether this evidence is sufficient to establish that the Chakai estate was originally *ghatwali*, with the consequences flowing therefrom, we are of opinion that, though this is a case of eject-

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ment, it is not open to the appellants to say that the custom of impartibility did not exist.

The whole of the previous litigation assumed it. In their judgment of 17th July, 1878, the Privy Council say that the property must be taken to be joint ancestral property, although impartible. The written statement of the Maharajah in the previous litigation assumes the custom of impartibility, though he alleged that this custom had reference solely to the sons of the body of the deceased proprietors. The plaint in this suit alleges the custom, and the written statement does not deny impartibility, but the rule of inheritance according to lineal primogeniture. No issue was raised on the point now argued, and the evidence was not directed to it. Had this been done, it would have been necessary to enquire as to which properties were *ghatwali*, and then whether any property was originally held by the family, which was not *ghatwali*. If such were the case, the family custom might, even if there had also been *ghatwalis*, have operated as regards such other properties, and, if it so operated, it would have also governed the succession of the *ghatwali* properties after resumption on resettlement. The point taken by the appellant would only be made out, if it were shown that the family never at any time possessed any property, other than *ghatwali* tenures, in respect of which the alleged custom could have existed and upon which it could have operated. It is true that the plaint refers only to Chakai, Nowdiha and Chandwari as the immoveable properties of the family. But this statement is made merely as regards the state of affairs at the date of the death of Fateh Narain in 1863. Further, we must accept the recorded statement in the judgment that the impartibility of the estate was admitted. It cannot be impartible except by custom. We hold, therefore, that the estate was an impartible estate governed by the Mitakshara law and custom. The next question is, therefore, whether, being impartible, the rule of succession to it is by lineal or ordinary primogeniture. The oral evidence on this point is all one way and is given by the adult members of the family, an agnate, the *guru* and the

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family priest, and as to the custom of similar *gaddis* in this part of the country. It is supported, for what it is worth, (for it is to be observed that the Court held the witness not competent in examination-in-chief) by the evidence of the defendants' witness Jayjayram Ray, who in cross-examination spoke to the custom of succession. All classes of persons have been called who might be supposed to know of the custom. It is to be here observed that the remaining property which belongs to the estate, is now in the sole possession of the plaintiff, and it is not to be supposed that he would be permitted to retain such sole possession unless there were such a custom as that to which these witnesses depose. It was set up as far back as 1870, though not expressly referred to in the litigation immediately preceding this date. No instance of collateral succession has been proved, the succession of Loke Narain and Dharam Narain being of lineal, and not collateral, succession. Such instances would, no doubt, have strengthened the evidence; but they are not absolutely necessary, particularly whereas here the dispute is not between members of a family as to what its custom is, but between the family on the one hand and a stranger. The Subordinate Judge has adverted to portions of the oral evidence which did not appear to him satisfactory but, notwithstanding this, he has accepted that evidence as substantially true. We do not think that he has done so merely because (as argued) he considered that the evidence spoke only to a rule which, apart from such evidence and according to the reported decisions, would govern the case. The evidence, being, as it is, wholly un rebutted, we accept it. As regards the holding of the estate after the death of Fateh Narain by the three widows and not by the eldest, the explanation given is that this was by agreement among the widows. Garabh Narain then succeeded, and, on his death, Durga Kumari took, not as widow, but as heiress of her son, it not being established that there was any rule excluding females. The chief objection which has been urged is based on the petitions of Nagar Singh, Harnath Singh and Durga Prasad. As regards the two former, we find that, in the previous suit,

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the High Court (6th June, 1873), refused to place any reliance on these petitions, which were not filed in that suit until 6 months after the evidence was closed and in fact only the day before the Subordinate Judge gave judgment; nor can we rely thereon. Neither Nagar Singh nor Harnath Singh were parties to this suit in which they intervened with their petitions with the object apparently of supporting the then plaintiff's case.

The allegation in the previous suit was that Nagar Singh had colluded with the plaintiff. The petition states that the petitioners had an equal right with Durga Singh, and that the latter had admitted this in a petition in the case for mutation of names. As regards the latter petition, it was suggested during the course of the argument that the words "and Nagar Singh and Harnath Singh the cousins, etc., of the said Tikait" have been interpolated. Reference has been made to the use of words "my right," "harass me" and "justice done to me," which must, it is said, refer to Durga Prasad alone. Standing by themselves, the words used are, however, ambiguous, being capable of being translated in the plural. It is said that the words "your servant (*fidwi*) therefore begs to file this petition" indicate the singular. This, however, may be explained by the fact that it was Durga Prasad alone who was filing the petition. This case of interpolation should have been put in the evidence. We, however, sent for the original document and have inspected it. It does not appear to show any signs of interpolation and appears, on its face, to be genuine. But it is not easy to see how it came to be made; for, if the estate were impartible, Durga Prasad, Nagar Singh and Haranath Singh could not all be entitled. The two either excluded Durga Prasad, or he them. Further, Parasnath was equally entitled, if they were. Nor is it apparent why, if Nagar and Harnath were objecting, they did not themselves petition. And, if Durga Prasad was protecting his rights, why did he go out of his way to bring in the alleged rights of others. Next, if he were in fact setting up these others as entitled with himself, his other statements are inconsistent with such an as-

sertion. *For this petition of Durga Prasad is dated 21st May, 1863, and from the proceedings of the Collectorate less than two months later, dated the 3rd July, 1863, it appears that he had stated, not that he and the others were jointly entitled, but that the nearest relation became the heir, and that he was the heir. It is a singular circumstance that within so short a period two such different cases should have been set up. The alleged statements in the petition are further inconsistent with the information given at the police station on the 2nd March, 1866, to which reference has already been made. While it may be admitted that this petition of Durga Prasad goes, for what it is worth, against the plaintiff's case, it is by no means sufficient to outweigh the other evidence.

We hold, therefore, that the family custom alleged has been proved, and that the plaintiff's title has been established. We, however, may here point out that, even if the first plaintiff's title had not been established, we have, as parties to the suit, the person who would admittedly, on failure of the proof of his title, have been entitled to succeed and were joint plaintiffs with him. These persons have released their rights (if any) in favour of the first plaintiff. It has been held that these documents did not operate as conveyances. If they did so operate, then the first plaintiff's right to sue is established notwithstanding failure to prove his own right of succession. If they did not so operate (though under the circumstances it is not necessary to determine the point), then we should have been disposed, in order to do justice in the case (for further litigation by the co-plaintiffs to assert their title would be barred), to accede to the application made to us that, in the event of our holding that the title of the first plaintiff had not been made out either in his own right or by virtue of the alleged transfers to himself, we should act under the provisions of o. XLI, r. 33, of the Civil Procedure Code, or (if that rule be held to be inapplicable) that the co-plaintiffs (Tribhuban's sons) might have leave to appeal against the decree. If, as is admittedly the fact, one or other of the plaintiffs is entitled by

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succession, it does not seem to us to be right that the suit should be dismissed because the first of the plaintiffs alone had failed to make out a title, particularly when, as the result of our so holding, the right of the co-plaintiffs (who, if the first plaintiff were not joint with the last male holder, would, on failure of the first plaintiff's case, be entitled) was thereby barred. It is, however, unnecessary to pursue this point further as we hold on the evidence that the first plaintiff, and not Tribhuban's son, is, by virtue of the family custom he has established, entitled to succeed to the estate.

The title of the first plaintiff having been thus established, we proceed to deal with the question whether the transfers by or through Durga Kumari bind the estate, of which he is the heir. The transactions which are impugned in the suit are as follows. On the 5th September, 1870, Durga Kumari sold 6 annas of *taluk* Chakai to the appellant's ancestor for Rs. 85,000. The recital to the *kabala* states that large sums of money were owing on mortgages to the appellant's ancestor and to one Saheb Ram Ray and other bankers. The former mortgages which are in evidence, are dated the 20th October, 1868, 11th April, 1869, 11th August, 1869, 22nd December, 1869, and 11th April, 1870, for the sums of 8,025, 5,000, 5,000, 8,000, and 10,000 rupees, respectively, making in all Rs. 36,025. These mortgages recite that money was required to defray debts due to *mahajans*, Government revenue, a decree due to Lala Darshan Lal, expenses relating to *ghatwali* cases in the Sudder Court and Privy Council, and to meet personal necessary expenses. On these mortgages at the date of the conveyance there was due Rs. 40,670-15-0 to the appellant's ancestor, the Maharaja Sir Jaimangal Singh Bahadur, for principal and interest. The balance, which was paid in cash, went, it is said, to discharge debts due to the other creditors. The second transaction, dated the 5th September, 1876, was a sale in execution against Durga Kumari. This and the third transaction, a conveyance, dated the 4th October, 1877, are connected with others which Durga Kumari had with one Nawab Lutf Ali. The latter had lent to Durga Kumari the

sum of Rs. 47,000, on three mortgages, dated the 24th March, 1871, 2nd June, 1872, and 4th February, 1873, for the sums of 10,000, 20,000, and 17,000 rupees, respectively. These mortgages recite that money was required to meet expenses of litigation in the suit brought by Durga Singh, the case of one Bhanjan Bhagat pending in the Calcutta High Court, a decree due to Msst. Thakurani Anandu Koeri, monies due on bonds to one Madho Singh and Raja Lilanand Singh in respect of High Court costs in a litigation relating to *mahal* Nowdihia, etc., and necessary expenses. The Maharajah gave the mortgagee a letter of security in respect of these mortgages. *Ex parte* mortgage-decrees were obtained on these mortgages, two of which were subsequently set aside, but decrees, dated 17th January, 1876, were passed on the re-hearing against the mortgagor and personal decrees against the guarantor. Two annas of the *taluk* was then sold in execution and the Maharajah purchased this share on the 5th September, 1876, for the sum of Rs. 11,170. As this sale did not satisfy the Nawab's mortgage-decrees, in respect of which it is alleged about Rs. 55,000, remained unpaid, Durga Kumari on the 4th October, 1877, sold 4 annas of the same *taluk* to the Maharajah for the sum of Rs. 56,000, which, in terms of the mortgage, was to be returned by the lender for the satisfaction of the Nawab's claim.

These payments are shown in the appellant's account books (Exh. M, N, O). These transactions disposed of 12 annas of the *taluk* to the Maharajah. The remaining 4 annas was disposed of as follows. On the 9th June, 1879, Durga Kumari executed in favour of the Maharajah's *benamidar* a *mokarari* lease of the remaining four annas, and thereafter, on the 5th February, 1881, sold for Rs. 8,000, the *malikana* or proprietary right to the Maharajah, who thus became proprietor of the whole 16 annas of the *taluk*. The *mokarari* lease recites the reasons for its execution to be that Durga Kumari was a *pardanashin*, who could not make proper arrangements for management and collections; that she had always to borrow money to pay Government Revenue; and that she was in need of money to pay rent to Rajah Lilanand under

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a *mokarari* held by her under him. The reasons for the subsequent sale of the *malikana* are stated to be a debt on account of rent in arrears in respect of a *mahal* held under Rajah Lilanand, a debt due in the execution case of one Man Singh, other debts, and expenses of pilgrimage. As regards one of the *mouzas* of the *taluk*—Tinghara—it appears that Durga Kumari, on the 26th November, 1870, made a *brahmottar* of it in favour of one Ahlad Pandey. As this was subsequent to the conveyance of the 5th September, 1870, the transaction was operative only to the extent of 10 annas, but thereafter Ahlad Pandey got from the Maharajah the remaining 6 annas. The entire 16 annas was then sold to the appellant on the 20th June, 1897. The case as regards this for the respondent is that Durga Kumari could not make the gift, so that Ahlad Pandey took nothing and conveyed nothing to the appellant. The appellant contends that, if his transfers stand good, then he is entitled in any event to 6 annas of the *mouza* and is not affected by the fact that his ancestor permitted Ahlad Pandey to retain possession of that portion. The property conveyed in *lakhiraj brahmottar* is stated in the deed executed in 1870 to yield a profit of Rs. 150 a year. It will be observed that Durga Kumari thus borrowed between the years 1870 and 1881 a sum exceeding Rs. 1,60,000 and had during the last year alienated the most substantial portion of the estate, the remaining properties being of comparatively insignificant value. It is for the appellant to establish either that there was legal necessity in fact for these large borrowings or that from sufficient enquiries made he honestly believed that there was such necessity. It has been argued that the onus upon the appellant is lightened by reason of the lapse of time. But lapse of time does not affect such a matter except in so far as it might give rise to a presumption of acquiescence or save the appellant from adverse inferences arising from the scanty proof offered. In the present case there was admittedly no acquiescence. On the execution of the first mortgage in favour of the Maharajah in 1868, Durga Prasad objected. This he did again on the execution of the first conveyance in 1870, and he subsequently brought a

suit which went to the Privy Council, challenging its validity. In his petitions, dated 22nd October, 1868 (Exh. 27) and 15th October, 1870 (Exh. 26), he alleged that there was no necessity. These objections and the suit should have put the Maharajah fully on his guard, the more particularly as had been pointed out by the Judicial Committee in the suit of 1870 that the evidence was very conflicting as to the necessity for even the first conveyance. The Maharajah then lent the money and purchased the properties at his own risk and should have taken care to obtain and preserve proper evidence of legal necessity if it existed. The appellant has not even in this suit produced all the evidence which might have been produced, such as his collection papers. And even if he had, it would not avail him unless such evidence were sufficient to establish the fact, the onus of proving which is undoubtedly upon him. The state of affairs as regards the property at the death of Fateh Narain (and much the same state of affairs prevailed at the death of Garabh Narain) was as follows. The lower Court has found,—and this has not been contested before us,—that the allegation that a large sum in cash was made over to Durga Kumari, has not been made out. The immoveable properties consisted of *taluk* Chakai and two *ghatwalis*, Nowdiha and Chandwari. The first property was of an area of some 28 square miles and 61,981 *bighas*. According to the evidence of the appellant's witness, Choa Lall, there were about 30 to 32,000 *bighas* of jungle and hill country. The parties are at variance as to the income derived from the immoveable property. The evidence shows that each of the *ghatwalis* yielded an income of about Rs. 2,000; that is Rs. 4,000 from the two. According to the appellant's evidence the income of Chakai must have been about Rs. 8,000. His witness Choa Lall says that 6 annas of the property was sold to the Maharajah for Rs. 85,000 at thirty years' purchase. This gives an income of Rs. 2,833 for the 6 annas and Rs. 4,720 for the 10 annas, or Rs. 7,533 for the whole. This would make the total rental about Rs. 12,000, and would show that the income tax return at Rs. 8,000 was an undervaluation, apart from the fact that

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income tax would not be payable on *kamat* land cultivated by the proprietors. For the respondent it is contended that the income from the immoveable property was over Rs. 24,000. It is urged, in the first place, that it is not likely that thirty years' purchase would be paid for property in the hands of a Hindu widow alleged to be out of possession, and that fifteen or twenty years' purchase would be the proper figure, which would make the rental of 6 annas Rs. 4,500 and of the whole 16 annas Rs. 12,000. In addition there is evidence that there were several *khamars* and the income derived from *kamat* land 5 or 6,000 rupees a year. There, it is said, income was derived from *phalkar*, *bankar*, etc. The plaintiff has produced a *jamabandi* of Chakai for the year 1277. This shows a total *jama* of Rs. 18,755-1-0. The appellants allege it to be a forgery. If it were, it is not likely that the *jama* would have been limited as stated in the document. The witness Nundo Lall says that it is the writing of his father, who was in the employ of Durga Kumari. His evidence is, no doubt, in many respects unsatisfactory, but we are not prepared to say that it is false when he speaks to his father's writing. For the document is in general accord with the oral evidence, and (this we consider important) the appellant, though admittedly in possession of evidence which, if produced, might show it to be false, has not produced such evidence. He is now in possession of the entire property and has been in possession of 6 annas since the year 1870; but he has not produced his collection papers, and no reason has been given in the evidence why he has not done so. The explanation given in argument, that it might be that the Maharajah was not willing to disclose the increased value of the property, is in part at least disposed of by the evidence of Choa Lall, who says that the *jamabandi* as regards to 6 annas has only slightly increased by 400 or 500 rupees since the purchase by the Maharajah. His oral evidence that the income of the 6 annas is only Rs. 2,000 is opposed to his evidence that Rs. 85,000 was paid for it on the basis of thirty years' purchase. Ram Prasad Singh, who is stated to know the income, is not called, and no explanation is given of this or the non-

production of the collection papers. In Exh. R. R., a collectorate *rubakar* of 4th September, 1876, the *kham* or gross produce of Chakai is stated to be Rs. 6,717-8-4½. This figure, which is said to have been derived from the proprietors' *jama-bandi* papers, is so greatly below the estimate of the *amin* (Rs. 37,688-6-8½) as not to be reliable, though the latter may be an over-estimate. The income-tax was, no doubt, assessed in 1870, on an income from zemindari of Rs. 8,000. Apart from the possibility of under-valuation of income, it appears from a Government Resolution (*Calcutta Gazette*, p. 768, Jan.-June, 1869) that deduction was allowed for Government revenue, for collection charges, and for interest payable on mortgages. The assessment would also not include profits, not being rental, arising from *kamat* land. The conclusion at which we arrive, is that the income has been undervalued in the appellant's argument and that it amounted at least to Rs. 18,000 odd, as stated in the *jama-bandi*, if it was not more. But then it is said that, whatever was the income of the estate, Durga Kumari was kept out of possession from either 1865 or 1868, until the conclusion of the litigation in the Privy Council in 1878. Particular stress is laid by the appellant on the evidence of the plaintiff's own witness, Gur Prasad Upadhyaya, who in cross-examination stated that Durga Kumari got possession 8 or 10 years after the death of Garabh Narain, that is, in 1873-5, and that during litigation no collections were made. This evidence falls short of establishing the case that possession was not had until the decision of the Privy Council in 1878. It does not appear to us to be reliable in itself, and it is not borne out by the other evidence in the case, including that of the appellant's own witnesses. Gur Prasad Upadhyaya is the family *purohit* of the Tikaits of Chakai, and was called to prove the alleged family custom. In cross-examination, he spoke to the question of possession. His evidence is vague and that of a person, who does not appear to have competent knowledge on the point, and it is at variance with that given for the defendant, who relies on it.

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The facts, as regards possession, appear to be as follows: On the death of Fateh Narain on 18th April, 1863, his widows appear to have been in possession. They applied for registration of their names in April, 1863, and Durga Prasad's objection thereto was overruled. When the posthumous son Garabh Narain was born in July, 1863, he became entitled to the estate and during his life time there was no subject-matter for dispute. He died in April, 1865. After his death (when exactly, is not quite clear) disputes arose, and some time before November, 1868, Durga Kumari left, or was driven out of, the family dwelling house and went to Nagri, and on the 5th of that month she instituted a suit against her co-widows and Durga Prasad. According to the plaint in that suit she was in possession of one-third of the property. This was denied by Durga Prasad. The finding in that suit was that she was in possession of that share. Judgment was given in her favour in the lower Court on 23rd March, 1869. This decree was confirmed by the High Court on the 5th January, 1870. On the 5th September of the same year, she sold 6 annas of *taluk* Chakai to the Maharajah. In January, 1871, writ of possession was taken out. By the purchase, the Maharajah became a co-owner with Durga Kumari in undivided shares. Whatever may be said as to the difficulty of Durga Kumari, a Hindu widow surrounded by hostile relations, getting possession, there can be no question but that the Maharajah, a powerful local zemindar, could not have been kept out of the enjoyment of an estate of which he had purchased a 6-annas share. There are other circumstances apart from recitals in documents, upon which great stress should not be laid. Durga Prasad's suit in 1870, alleged, that he had been ousted from possession by Durga Kumari. In the bond executed by Durga Kumari in favour of Sidhnath in 1874, the executant purported to make over possession. He attempted to take it, but failed. If, however, she had not been in possession, she could not have prevented it. In 1873 application was made for partition of the estate. The partition proceedings went on during 1873 and 1874, and show that collections were being made. Grants were given

to Durga Kumari's pleaders in payment of their fees, and also to Ahlad Pandey. There is no record of civil or criminal proceedings as regards possession. According to appellant's witness Choa Lall, Durga Kumari obtained possession of 16 annas of the property, 8 or 10 months after getting the decree dispossessing Durga Singh and Lalit Kumari, having previous to suit been in possession of one-third, though in re-examination he qualifies this statement by saying that the possession was nominal only. If the Maharajah was in possession of his undivided share, then we think his vendor must have been. If he was not in possession, his books and papers could have been produced to show that no collections were made. It is not, however, likely that the Maharajah, who was the purchaser (it is said for full value) of 6 annas of the property in 1870, was or could have been kept out of possession; nor is it likely that he remained content with a merely nominal possession. The conclusion at which we arrive, is that, though the possession of one-third of the estate between 1868 and 1870 may have been precarious, possession was obtained about the year 1870 both by Durga Kumari and her vendee, the Maharajah. Then, as regards debts, these are said to be of two kinds, ancestral debts incurred by Loke Narain and Fateh Narain and amounting to 35 to 36,000 rupees, and debts due to *bharnadars* or usufructuary mortgagees, which are said to have amounted to not less than Rs. 20,000 besides decretal amounts. The debts of all kinds due from the estate on the death of Fateh Narain are said to have amounted to Rs. 60,000. The proof as to both classes of debts and generally as to legal necessity practically rests on the evidence of the witness Choa Lall. We may say at once that we cannot accept this witness's evidence. He was a servant of both the former Maharajah and Durga Kumari, whose service, it is alleged, he entered with a view to furthering the Maharajah's designs on the estate. Ahlad Pandey was also a servant of both parties and is alleged to have been the chief instigator of these transactions, so far as Durga Kumari was concerned. Choa Lall is now a servant of the appellant, and he admits in cross-examination that he will lose his service if the

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case goes against his master. His evidence is put forward to prove practically the whole case on this issue. Apart from the question whether the witness is telling the truth as he believes it (he has been disbelieved by the Judge) he himself stated that the evidence given by him as to the alleged necessity for the loans was given after looking into the bonds and that previous to that he had no recollection. Further than this he admits that he entered into the service of Durga Kumari only some 5 or 7 days before she left the family dwelling house at a time when he was, as we have stated, also a servant of the Maharajah. The only documentary evidence (and that the Judge has accepted) is a decree in favour of Kirat Chand for Rs. 2,800. As regards the recitals in the five bonds in favour of the Maharajah, there are general statements that debts are due to *mahajans*, but with the exceptions noted, it is not stated when, by whom, for what purpose the alleged debts were incurred, their amount, or the names of the creditors. The debt of Darshan Lall (mentioned in the bond of 25 Cheyt 77) appears from the petition of the creditor not to have been an ancestral debt. The conveyance of the 6 annas mentions the name of Saheb Ram Roy, but there is no documentary evidence of his debt, though it is said, he obtained a decree. This absence of details in the recitals is the more remarkable in that the evidence for the defendant is that the Maharajah made due enquiry and in the course of the enquiry demanded documentary evidence, that lists were prepared, which were made over to him but are not forthcoming, and that details were written in his *rokar* books, which are not produced. The mortgage bonds of Lutf Ali Khan do not mention ancestral debts. No doubt, in the suit of Durga Prasad, Durga Kumari, in her written statement, alleged that her husband had died, leaving debts to the extent of Rs. 60,000, but this statement was made at a time when her conveyance to the Maharajah was being impeached and in support of it in a joint defence by herself and the Maharajah, the purchaser. Beyond the existence of the decree in favour of Kirat Chand, we hold that the existence of the alleged

ancestral debts has not been established. Then it is said, that certain *bharnas* or usufructuary mortgages were paid off. The evidence of Choa Lall, the defendant's witness, is that some of these were registered and that the Maharajah demanded that, when paid off, they should be returned to him. No *bharna* or copy of a *bharna* has been produced, and no explanation has been given of this circumstance. Although it is alleged, that large portions or the whole of Chakai were in possession of *bharnadars* no mention of *bharna* is to be found in any of the bonds or conveyances executed, except the alleged bond in favour of Sidh Nath Singh, the subject of the cross-appeal. But if there were such debts, the recital in this bond is contrary to the evidence that all these debts were paid off prior to 1870 by moneys borrowed from the Maharajah. According to the witness Ghanshyam Pandey, Ahlad Pandey got back all the mortgages. This man had been, as was Choa Lall, in the service of the Maharajah. Though the evidence is that the Maharajah required these documents he is unable to say whether Ahlad Pandey made them over to the Maharajah. In this connection we may observe that Choa Lall says that, on being asked for a loan, the Maharajah made enquiries by "asking creditors, seeing papers, as well as copies of decrees. As to the decrees in execution, enquiries were made by asking the mahajan decree-holders, and about instituting civil suits pleaders and mukhtiaris were consulted." Except, however, as stated, no such decree-holders have been called or papers or decrees produced. We hold that the existence of these *bharnas* has not been established. Then it is said that expenses were incurred in the litigation relating to the *ghatwalis*. There is no evidence what the litigation was, what stage it had reached, what expenses were incurred, or what was reasonably required. That 13 or 14,000 rupees were paid for obtaining a *mororari* settlement of the *ghatwali mehals* depends on the the testimony of Choa Lall alone, who says that, of this sum, Rs. 7,000 was paid away in bribes to Rajah Lilanand's *amlahs*, Rs. 4,000 to Raja Lilanand himself, and Rs. 2,000 to his son. Though the bribes would not, of course, so appear,

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the payment to the Rajah should appear in the *mokarari* deed. But this has not been produced. We cannot rely on Choa Lall's evidence alone, either as regards this matter or the alleged necessities of Durga Kumari. Then it is said that the expenses were incurred in the course of the litigations which took place between Durga Kumari and Durga Prasad. That there were such litigations is a fact, and expenses must have been incurred. But it is not sufficient to establish these two facts. It must be shown that the expenses could not have been made from the income of the estate, that they were reasonable, and what they were. The evidence is of a very vague character and practically depends on Choa Lall, whose testimony, we agree with the Subordinate Judge in not accepting. Choa Lall says that 6 to 7,000 rupees was spent in Durga Kumari's suit in the lower Court and 8 to 9,000 rupees in the High Court; that 8 to 9,000 rupees was spent in defending Durga Prasad's suit in the lower Court and 20,000 in the High Court. There is no evidence as to expenses incurred in the appeal to the Privy Council. There is no documentary evidence in support of all these vague statements, and such evidence as there is available shows that they are not correct. The appellant's own witness, Tarini Prasad, states that Durga Kumari's cost of litigation in the two suits at Bhagalpur must have extended to 2,000 rupees. As regards pleader's fees, the decree of the Subordinate Judge of the 23rd March, 1869, in the first suit, shows that two pleaders appeared for the then plaintiff, whose costs were Rs. 1,935-9. Two pleaders appeared on appeal to the High Court, where the costs allowed were Rs. 183-2-4. The decree in the second suit is not on the record. Two pleaders appeared in it for Durga Kumari, and these same two pleaders with another appeared for the Maharajah, who was a co-defendant. The defence was a joint one, and, if Durga Kumari had been properly advised, she would have left the Maharajah, who was the party really interested, to fight the case. In the High Court the same counsel and pleaders appeared for both the Maharajah and Durga Kumari. The evidence of Choa Lall as regards the pleaders em-

played* appears to be untrue. He mentions some names which are not to be found in the documents, and says that Gopal Babu was a pleader for Durga Kumari and received Rs. 120 a day, whereas the record shows that he was a pleader for Narain Kumari. Even if this witness were trustworthy, we should have considered his evidence to be under the circumstances too vague.

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Apart from this, the moneys alleged to have been borrowed from Lutf Ali for the purposes of litigation (the legal necessity for which has not been proved) were admittedly obtained in the first instance by the Maharajah's own servants and brought to his residence at Pashanda. It is, no doubt, alleged by Choa Lall that it was there made over to Durga Kumari. But this we are not disposed to believe. The Maharajah was interested himself in the second suit, in fact the only party interested, and he had given his personal security for the loan. It is not likely that it was made over to Durga Kumari, who might then have refused to part with it and left the Maharajah to find the funds for the litigation which impeached his purchase from her. Under these circumstances, it was further incumbent on the Maharajah to show the disposal of the money over which we think he kept control. It is possible that some portion went towards the expenses of Durga Kumari; but what portion does not appear, and no accounts of the cost of the litigation are produced.

As regards Bhanjan Bhagat's litigation, no decree or other papers are produced. What was the amount of the decree or costs is not stated.

Then some vague evidence is given as to the expenses for wages of servants and living expenses of a quite valueless character. The argument on this head is merely speculative. The living expenses have been fixed at 250 rupees a month, though no one has said so, and the total estimate on this head is dependent on the assumption that Durga Kumari was out of possession till 1878, a matter with which we have already dealt. It appears to us to be quite clear that the defendant has failed to establish legal necessity, in fact, for the trans-

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actions in suit. As regards the *mokarari*, learned pleader for the appellant admitted in appeal that he could not support it or the subsequent sale of *malikana* in so far as the conveyance was concerned, but he claimed to be entitled to a charge for the sum of Rs. 8,000, which, he says, he actually paid for the *malikana*. Of this sum, Rs. 6,000 is alleged to have been paid to one Manrup under a decree, though the particulars of his debt are not proved, and the evidence given on this point is of a conflicting and unsatisfactory character. The balance of Rs. 2,000 is said to have been taken to meet litigation expenses and expenses of pilgrimage. What litigation expenses does not appear, and as this was in 1881 when the litigations spoken to were all over and very considerable sums had, it is said, been received for the same alleged purpose, the evidence does not appear to be true. We hold that that the defendant-appellant is not entitled to any charge on this account.

As regards the purchase at the auction sale in 1876, the sum paid was Rs. 11,170, though the proper price was at least Rs. 28,000. The sale certificate has not been produced. There is nothing to show that the Maharajah purchased more than a life-interest. The decree was a decree of the Patna Court, and the property was in Monghyr. It was a money-decree passed in Patna on the ground that the money was repayable in Patna. We hold that this Court-sale was not binding on the plaintiff.

Lastly, as regards the *brahmottar* gift to Ahlad Pandey made "for the purpose of propitiating malignant planets." The value of the property so dealt with appears from Ex. P., by which it was sold to the Maharajah in 1897, to be Rs. 11,000. The grantee was not a *purohit* of Rajbansi Rajputs, but of Sudras, and he appears to have come over to Durga Kumari from the employment of the Maharajah with a view to securing her property for the latter. The gift was made almost immediately after she had sold 6 annas to the Maharajah, who had his eye on the property, and apparently it was Ahlad's reward for having arranged the sale. From the *jama kharach* (Ex. 7a—7d) of the Maharajah it appears that

the latter paid the fee for the registration of the deed of gift. Sahebram, a connection of Ahlad, living with Durga Kumari, is also shown by the same accounts to have received a reward of Rs. 1,000. Though Tikaitni had at this time power of disposal over only 10 annas, the other 6 having already been disposed of to the Maharajah, the latter ratified the grant as regards his 6 annas. Choa Lall was a witness to the deed of gift; so also was Sarman Pandit, to whom shortly after another deed of gift is made likewise "for the propitiation of malignant planets." It has been contended that the deed of gift to Ahlad Pandey was for a pious purpose, and that a Hindu widow may alienate small portions of the estate for such a purpose even though not conducive to the spiritual welfare of the deceased husband. We need not discuss the law on this point as, on the facts, we are of opinion that, even if the gift to the agent of this lady had really been made for the purpose declared in the document, she was not, regard being had to the value of the property, entitled to alienate it. It is to be observed that she did this at a time when (according to the appellant) she was in such poor circumstances that she had had to sell 6 annas of the estate to repay her borrowings. We have ourselves held that no necessity has been established to justify the sale. In no case under the circumstances was this gift justified so as to be binding on the reversioners.

We hold that no legal necessity in fact has been proved and we now pass to the question whether the Maharajah is protected by the enquiries he is alleged to have made. It appears from the evidence that the Maharajah's property surrounds on all sides that in suit and that he had a mind to purchase the latter. This is the evidence of his witness Choa Lall. When troubles arose in the respondents' family, we find servants of the Maharajah going over to, and taking employment with, Durga Kumari. These persons were, in fact, purporting to serve two masters. They or some of them go over with their mistress to the Maharajah to borrow money on the security of the property which the Maharajah wished to purchase. The departure of Durga Kumari from

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the family dwelling-house is followed by the first bond of 20th October, 1868. In November of that year she filed her suit alleging that she had been dispossessed of two-thirds of the property only. A decree was obtained in four months, and the litigation was concluded in 14 months. Shortly thereafter Durga Prasad brought his suit. This litigation went on till 1878, and during this time all the transactions in suit took place except the *mokarari*. The result of this was that the lady, in the course of defending her husband's estate was deprived entirely of its most valuable possession. After the first of the transfers to the Maharajah, Ahlad Pandey and others appear to have been rewarded. Though we do not rest our judgment on this point, we doubt whether Durga Kumari knew what was being done by Ahlad Pandey in her name. The Judge has found that the full price was paid for the first conveyance, and, if this be so, good value was given for the conveyance of 1877; and this circumstance is relied on to show that the Maharajah was buying the inheritance. This, though a circumstance in his favour, is obviously insufficient by itself; for otherwise every transaction with a Hindu widow for full value would be valid. On the other hand an obviously insufficient sum was given for the *mokarari* at a time when there was admittedly no litigation. Even according to the appellants' estimate, the income of a 4 annas share of Chakai would be worth 15 or 1,600 rupees, yet the rental was only 500 rupees, of which half was payable for revenue. Then shortly afterwards even that is taken over from Durga Kumari for Rs. 8,000, of which only Rs. 2,000 is said to have been paid in cash. This property, according to the appellant's own valuation (as set upon the first 6 annas sold), was worth Rs. 56,000. The purchase of the 2 annas at the auction sale in 1876, was also very much under value. In the result, by these various transactions the Maharajah, who in the evidence is stated to have been a clever man of business, obtained possession of the whole of the estate, which was in the centre of his own property, and which he had all along a mind to purchase. It is necessary to refer to these circumstances both as bearing upon the

question of the likelihood and the nature of the enquiry made and because it has been represented on the appellant's behalf that the Maharajah only came forward out of motives of kindness to assist a persecuted woman, and with the same object gave his personal security for loans made for expenses of a litigation in which he was the party really interested. Nextly, it is to be generally observed that the Maharajah was from the very commencement put on his guard that the next reversioners challenged the validity of his transactions with Durga Kumari. The evidence as to his alleged enquiry is as follows: Madho Singh says that the Maharajah did not make enquiries through him or in his presence, but that Ahlad Pandey used to give lists of the expenses required mentioning the purposes for which they were required. These lists were all with the Maharajah, but after execution of the documents "were not cared for." Mosaheb Lall says that the Maharajah enquired of Ahlad Pandey and Ghanshyam, who were his own servants, and of Durga Kumari; that he did not make any other enquiry at any other place; and that he did not consult the heirs. Enquiry should be of the creditors and heirs, not merely of debtor, who wants to borrow and as regards whom the question arises of the right to borrow. This evidence is obviously insufficient. Joy Ram Ray, moreover, contradicts it and says that besides enquiry of the servants mentioned, including Choa Lall, Durga Kumari's father and several others were consulted. Ghanshyam says that enquiries about the creditors were not made of the creditors themselves, but of Ahlad Pandey and that list and accounts were given to the Maharajah which have not been produced. In this connection we may mention that the evidence is that money for maintenance was lent on *chittas* and *purjahs* which were put before the Maharajah but which also have not been produced. Tarini Prasad, the retained pleader of the Maharajah, states that he was not consulted. Choa Lall in general conformity with the rest of his evidence, carries the case further than all the other witnesses. He says, contrary to the other evidence, that the *amlas* of the Maharajah

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were sent to make enquiry and that enquiries were made of the creditors themselves. Papers and copies of decrees were inspected. Decree-holders were consulted as also pleaders and mukhtears. These documents are not produced, nor are any of the creditors examined, nor are the decrees recited in the bonds. He says, further, that the Maharajah himself personally made enquiry. If this witness were a trustworthy one, we should be disposed to say that he gave evidence as to what he thought must have been done and not as to what he personally knew had been done. But we do not believe his evidence for the general reasons already stated and, further, because it is not in accordance with the rest of the evidence on this point. We agree with the learned Subordinate Judge in disbelieving the defendant's evidence on this part of the case. He has not, in our opinion, established that he made a sufficient or *bonâ fide* enquiry and that he did all that was reasonable to satisfy himself of the existence of the legal necessity alleged.

We now proceed to deal with the cross-appeal. It relates to the sum of Rs. 38,134-5-4, upon the condition of payment of which the property in suit has been decreed to the plaintiff. The learned Subordinate Judge has considered that the appellant is entitled to a charge on the estate for this sum. The facts on this point are as follows: Durga Kumari on the 30th January, 1874, executed a mortgage in favour of one Sidh Nath Singh, a son-in-law of Durga Prasad. Eight annas of *taluk* Chakai were mortgaged for one lakh. Of this sum, it is alleged, that Rs. 35,000 was advanced. Sidh Nath attempted to take possession and brought rent suits against certain tenants, but failed. Having occasion to borrow money himself Sidh Nath executed a mortgage in favour of the banker, Dhunput Singh. By this mortgage he mortgaged this bond and other properties. Dhunput Singh brought a suit against Sidh Nath and got himself appointed receiver therein. As such receiver, he, in 1892, brought a suit against Durga Kumari and the Maharajah (who had then acquired and was in possession of 16 annas of the property) to recover the moneys alleged to be due on mortgage to Sidh

Nath. • At this time, as already stated, the whole of 16 annas of Chakai was with the Maharajah, and Durga Kumari had no interest therein. The suit was contested by the Maharajah, and Durga Kumari filed a written statement in which she stated that Sidh Nath Singh had procured the bond from her by fraud. She denied that she had received the sum of Rs. 35,000 or any sum whatever. Dhunput Singh, however, obtained a decree against the Maharajah, who then appealed to the High Court. In this Court the case was compromised upon the terms of the Maharajah taking over Sidh Nath's bond in consideration for the sum of Rs. 38,134-5-4, paid by him to Dhunput Singh. Under these circumstances the Subordinate Judge has held that the payment by the Maharajah must be held to be one that benefited the estate, although he then made it to protect his own interest. In so holding, the Subordinate Judge was, we think, in error. The Maharajah was at the most (if he was that) an assignee of Sidh Nath's bond. That being so, it is not sufficient to show that the Maharajah paid Dhunput Singh, but it must be shown that Sidh Nath lent the money, and that he lent it for purposes of legal necessity. The payment by the Maharajah can only be said to have benefited the estate if Sidh Nath's mortgage was valid and for legal necessity. If Sidh Nath had himself sought to enforce the mortgage against the reversioner after the widow's death, he would have had to prove legal necessity. There is no evidence of such necessity. On the contrary the Maharajah's own evidence negatives the possibility of its existence, because the reason given as to the necessity in Sidh Nath's bond are debts which, according to the appellant's case, had been already paid off. The result, therefore, is that the appeal of the Maharajah is dismissed with costs, and the respondent's cross-objections, except as to Kirat Chand's debt (Rs. 2,800), succeed with costs.

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*Appeal dismissed;
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CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

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Execution of Decree—Stay of Execution—Civil Procedure Code (Act V of 1908), s. 145, o. XII, r. 5—Whether a security bond given by the Secretary of State for India in Council, but which was not sanctioned with the concurrence of a majority of votes at a meeting, is sufficient—Government of India Act, 1858 (21 & 22 Vict. c. 106), ss. 39, 40, 41, 42 and 55—Government of India Act, 1859 (22 & 23 Vict. c. 41), s. 1.

A decree for recovery of possession of immovable property having been passed against a minor under the Court of Wards and the Collector, an appeal was preferred against it to the High Court; subsequently the appellants applied for stay of execution of the decree, and as security they offered a guarantee to be executed by the Government of Bengal on behalf of the Secretary of State for India in Council; but it was not shown that the security had been sanctioned by the Secretary of State for India in Council with the concurrence of a majority of votes at a meeting, as provided by s. 40 of the Government of India Act, 1858:

Held, that the execution of the decree could not be stayed inasmuch as the security offered was not sufficient.

RULE obtained by the defendants, Srinibash Prasad Singh and another.

One Babu Kesho Prasad Singh brought a suit for recovery of possession of an estate known as the Dumraon Raj against Srinibash Prasad Singh, a minor under the Court of Wards, represented by the Collector of Shahabad and the Manager under the Court of Wards, in the Court of the Subordinate Judge. The Court below passed a decree in favour of the plaintiff on the 12th August, 1910. The operative part of the decree was in the following terms:—

“The plaintiff Babu Kesho Prasad Singh being the lawful heir of the Dumraon Raj is entitled to recover possession of all the properties appertaining thereto, and the defendant should make over peaceful

* Civil Rule No. 4459 of 1910.

possession of the same. He is further entitled to the reliefs prayed for in the plaint. The Court of Wards is liable to render accounts of all monies, movables and immovables of which it took possession at the time of its assumption of the charge of the estate. It is further declared to be liable for mesne-profits and other benefits for the period the plaintiff is kept out of possession, that is, from the date of dispossession up to the time he is restored to possession. The plaintiff shall be entitled to all his costs from the Court of Wards with interest up till realisation."

Against this decision the defendants appealed to the High Court, and subsequently made an application under order XLI, r. 5, of the Civil Procedure Code of 1908, for stay of execution of the decree of the Court below, and obtained this Rule. As security the petitioners offered a bond executed by the Chief Secretary to the Government of Bengal for and on behalf of the Lieutenant-Governor of Bengal in Council for and acting in the premises for and on behalf of the Secretary of State for India in Council.

Mr. Sinha, Dr. Rash Behari Ghose, Babu Ram Charan Mitra and Babu Mohini Mohan Chatterjee, for the petitioners.

Mr. B. C. Mitter, Babu Provash Chundra Mitter, Babu Manmatha Nath Mukherjee and Babu Narendra Chandra Bose, for the opposite party.

The Advocate-General (Mr. G. H. B. Kenrick, K.C.) as amicus curiæ, for the Secretary of State for India in Council.

Cur. adv. vult.

MOOKERJEE J. This Rule was granted upon an application under order XLI, rule 5, of the Civil Procedure Code of 1908 for stay of execution of the decree of the Court below. At the time the Rule was issued, the Court also made an order under sub-rule (4) of that Rule for stay of execution pending the hearing of the application. The circumstances under which the application has been made may be briefly narrated. Maharani Beni Prasad Keori of Dumraon died on the 13th December, 1907. The plaintiff Kesho Prasad Singh alleges that two days later he was evicted from the Raj estate, though he was the rightful owner thereof, and on

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the 16th December, 1907, the Court of Wards declared an infant, Jung Bahadur Singh, now known as Maharaj Kumar Srinibash Prasad Singh, as the owner thereof and took possession of the Raj on his behalf. On the 5th February, 1909, Kesho Prasad Singh commenced an action in the Court of the Subordinate Judge of Shahabad for declaration of his title, for the recovery of possession of the Dumraon Raj estate, for accounts and mesne-profits and for incidental reliefs. The suit, which was valued at three crores of rupees, was brought against the infant Jung Bahadur Singh alleged to have been adopted by the late Maharani under an authority from her husband, Maharaja Sir Radha Prasad Singh; the Collector of Shahabad, as representing the Court of Wards, and the Manager under the Court were also joined as defendants. The claim was strenuously resisted on behalf of the defence, and after a protracted trial, extending over many months, a decree was made in favour of the plaintiff on the 12th August, 1910. The operative part of the decree is in the following terms:—"The plaintiff, Babu Kesho Prasad Singh, being the lawful heir of the Dumraon Raj, is entitled to recover possession of all the properties appertaining thereto, and the defendant should make over peaceful possession of the same. He is further entitled to the reliefs prayed for in the plaint. The Court of Wards is liable to render accounts of all monies, movables and immovables of which it took possession at the time of its assumption of the charge of the estate. It is further declared to be liable for mesne-profits and other benefits for the period the plaintiff is kept out of possession, that is, from the date of dispossession up to the time he is restored to possession. The plaintiff shall be entitled to all his costs from the Court of Wards with interest up till realization." On the 8th September, 1910, the infant defendant represented by his guardian under the Court of Wards and also the Collector of Shahabad appealed to this Court against the decree of the Subordinate Judge, and obtained the Rule now under consideration, as also the *interim* order for stay of proceedings, to which reference has been made. The Rule first came to be heard before my learned brother Coxe and myself

on the 4th December, 1910. The materials then before the Court were the petition upon which the Rule had been issued, verified on the 7th September, 1910, and the affidavit of the plaintiff-respondent Kesho Prasad Singh sworn on the 1st December, 1910. After elaborate arguments the petitioners obtained an adjournment to enable them to consider what security they might offer under order 41, rule 5, sub-rule 3, clause (c) if the Court felt disposed to make an order for stay of execution. The Rule came on for further arguments on the 19th December, 1910. Meanwhile the petitioners had adopted, what must be regarded as an unusual and irregular course. On the 15th December, 1910, they filed an affidavit, which was ostensibly an affidavit in reply to that filed by the respondent Kesho Prasad Singh on the 1st December, 1910, but which in reality introduced new matters to supplement the allegations in their original application. Thereupon Kesho Prasad Singh on the 19th December, 1910, filed another affidavit, in which he protested that the affidavit filed by the petitioners on the 15th December, 1910, was irregular and ought not to be accepted. Kesho Prasad Singh also contradicted various allegations made in the second affidavit filed by the petitioners. The Rule was then further heard before my learned brother Coxe and myself on the 19th December, 1910. But as the petitioners were not ready to make a definite offer of security, they obtained another adjournment. The Rule then came to be heard by my learned brother Teunon and myself on the 4th January, 1911, when the petitioners offered as security what was described as a guarantee by the Secretary of State for India. The case was then further adjourned to enable the Advocate-General to be heard as *amicus curiæ* on behalf of the Secretary of State for India. Full arguments were addressed to the Court on the 17th and 18th January by the learned Advocate-General and by learned counsel on behalf of the decree-holder respondent and the judgment-debtors appellants. On behalf of the decree-holder, it was contended that the Rule ought to be discharged, *first*, because, upon the materials placed before the Court, there was no proof that substantial loss might result to the

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appellants, unless an order for stay of execution was made; and, *secondly*, because the security offered was not legally enforceable, and at any rate its validity was open to such grave doubt that it ought not to be accepted as a good security on the purposes of stay of execution. The learned counsel for the decree-holder further contended that the petitioners had acted in an entirely irregular manner, as it was not open to them to place on the record what was essentially a supplemental affidavit after the hearing had commenced and the matter had been adjourned to enable the appellants to consider whether they could comply with the requirements of the Code in the matter of security. On behalf of the judgment-debtors petitioners, it was contended that substantial loss would result to them if execution was not stayed, and that the guarantee offered furnished adequate security for the protection of the decree-holder in the event of his ultimate success. On behalf of the Secretary of State for India, the learned Advocate-General, as *amicus curiæ*, further contended that the guarantee offered on his behalf was ample security and its validity could not be questioned in a Municipal Court. The questions raised are of some novelty and by no means free from doubt and difficulty. The Court has consequently taken time to give the fullest consideration to the arguments advanced on both the sides.

Order XLI, rule 5, of the Code of 1908 provides in sub-rule (1) that an appeal shall not operate as a stay of proceedings under a decree, except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the Appellate Court may for sufficient cause order stay of execution of such decree. Sub-rule (3) next provides that no order for stay of execution shall be made under sub-rule (1), unless the Court making it is satisfied, (a) that substantial loss may result to the party applying for stay of execution, unless the order is made; (b) that the application has been made without unreasonable delay; and (c) that security has been given by the applicant for the due performance of such decree as may ultimately be binding upon him.

Each of these three elements is an essential pre-requisite to the grant of an order for stay of execution, and it is the duty of the Court to satisfy itself that each of these conditions has been fulfilled before an order is made in favour of the judgment-debtor. In the present case, no question arises as to the second element; the application was made very promptly, in fact even before the decree-holder could make an application for execution of his decree. The question, therefore, is restricted to the other two elements, and they may be separately considered.

The first question is, whether the petitioners have satisfied the Court that substantial loss may result to them, unless the order is made: *Gaikwar of Baroda v. Ghandi* (1). Here it cannot be disputed that the petitioners have adopted an irregular course. The affidavit upon which they applied for a Rule is not sufficiently specific. This appears to have been realised after the hearing of the Rule had commenced on the 2nd December, 1910, and an attempt was consequently made to import new matter in the supplemental affidavit filed on the 15th December, 1910, as an affidavit in reply. Strictly speaking, the matter ought to be decided upon the petition verified on the 7th September, 1910, and the affidavit in answer sworn on the 1st December, 1910. I do not desire, however, to base my decision upon what may bear even the semblance of a technical rule of procedure, and I shall therefore take into consideration the materials furnished by all the four affidavits. When the statements in the petition are analysed they reduce to this: that the plaintiff, opposite party, is a man of small means, that he has carried on the litigation with the aid of borrowed capital furnished by speculators, that, if he obtains possession, restitution may be impracticable and that the ascertainment of the mesne-profits may be difficult and protracted. This is supplemented by the stereotyped allegation that if proceedings are not stayed, irreparable injury will result to the appellants. The plaintiff-respondent challenges all these allegations. In his affidavit of the 1st De-

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cember, he states that he is prepared to furnish ample security for restitution, and that it is untrue that he has carried on litigation with the aid of the speculators, though he has been obliged to borrow money to defeat the unfounded claim of the Courts of Wards, who had at their disposal all the resources of the estate for over three years. He further asserts that the income of the estate is not eleven lacs a year, as stated by the petitioners, but sixteen lacs a year as stated in official papers; but that whatever the precise income may be, practically the whole of the income has been spent by the Court of Wards during the three years that the estate has been in their charge, besides cash to a considerable extent, of which the Court of Wards took possession upon the death of the Maharani. In the so-called affidavit in reply, filed on the 15th December, 1910, the statement of Kesho Prasad as to the income is disputed. An attempt is also made to justify the expenditure of the income during the three years that the estate has been in the possession of the Court of Wards. Statements then are made in the four concluding paragraphs of the affidavit as to the difficulty that might result if the management is changed, and reference is made to settlement proceedings and numerous suits for rent, now pending. A suggestion is also faintly made that the decree-holders, if allowed to obtain possession, may levy *nazarana*s, harass the tenants and make improvident settlements. The final affidavit of Kesho Prasad, filed on the 19th December, makes various allegations of improvident management and reckless expenditure during the years that the estate has been in the possession of the Court of Wards, and it cannot be seriously doubted that even if a fraction of these allegations is true, the management of the estate has not been above criticism. This, however, is a matter upon which the Court is not called upon to form a definite opinion at the present stage of the proceedings. The point for determination now is, whether the appellants have satisfied the Court that substantial loss may result to the infant unless execution is stayed. After anxious consideration and scrutiny of the materials placed before the Court, I have arrived at the conclusion that the

question ought to be answered in the negative. As already stated, the decree-holder offers to furnish security for restitution if an order for execution is made in his favour. If such security is furnished, it is difficult to appreciate how substantial loss may result to the appellants. The essence of the complaint of the petitioners is that the decree-holder is a man of limited means, and if he be permitted to execute his decree, restitution will be impossible. This is effectively met by the decree-holder when he offers to furnish security to the satisfaction of the Court for restitution before he obtains an order for execution. The allegation that the ascertainment of mesne-profits may be difficult is wholly unsubstantial. The appellants have now been in possession of the estate for over three years, and they may be assumed to be intimately acquainted with its condition. If therefore the decree-holder is allowed to execute his decree after he has furnished security for restitution in the event of reversal of the decree of the Court below, the defendants-appellants may be expected to be able to prove without difficulty the amount of profits actually receivable from the estate. The counsel for the judgment-debtors appellants has, however, contended that the estate might be wasted and injured if placed in the possession of the decree-holder, who might not improbably oppress and harass the tenants of this extensive estate. I confess speculative considerations like these do not carry any weight with me. The decree-holder claims the property as his own; he has successfully conducted a protracted and expensive litigation to assert his rights; why should he, as soon as placed in possession, begin to waste the property; if he makes improvident alienations *pendente lite*, the transferers will be bound by the result of the appeal. On the other hand, there is considerable force in the argument of the learned counsel for the decree-holder that as under the management of the Court of Wards during three years the whole of the income has been spent, it is immaterial whether such income is taken to be eight or twelve lacs a year, and as the savings made by the late Maharani to the extent of nearly 8 lacs of rupees have also disappeared, the estate could not very well fare worse in his hands than it has

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done under the management of the Court of Wards. I am, therefore, not able to appreciate why the decree-holder should be kept out of the fruits of the decree, if he is prepared to furnish security for restitution. The policy of the Legislature in this matter is obvious from the provisions of the Code. That policy is that the decree-holder is to be allowed to reap the fruits of his decree, unless sufficient cause is established for stay of execution. It may be conceded that in many cases when, upon presentation of an appeal to this Court, an application for stay of execution is made on the allegations that substantial loss will otherwise result to the judgment-debtor, the decree-holder does not challenge the truth of the allegation and is very often content to allow execution to be stayed if sufficient security is furnished. When, however, as here, the decree-holder challenges the allegation of possible substantial injury to the judgment-debtor, it is the duty of the Court to scrutinize the matter. This view is strengthened by an examination of the history of the legislation on this subject, as reviewed in my judgment in the case of *Tribeni Sahu v. Bhagwat Bux* (1). By sections 12 and 14 of Regulation 5 of 1793 and sections 10 and 12 of Regulation 6 of 1793, in the case of an appeal against a decree for the possession of land, the judgment-debtor could as a matter of right obtain stay of execution upon furnishing security, and in the case of all other decrees the Court could, in its discretion, either stay proceedings and take security from the judgment-debtor, or allow execution and take security from the judgment-creditor. This policy, however, was abandoned as early as 1859, and from the provisions of the Code of 1908, which are applicable to the case before me, it is clear that the judgment-debtor cannot obtain an order for stay of execution, unless he has satisfied the Court that substantial loss might otherwise result to him. To put the matter briefly, it is competent to the Court to accomplish the ends of justice to allow execution to proceed and take security for restitution from the judgment-creditor under rule 6 or stay execution and take security from the judgment-

(1) (1907) I. L. R. 34 Cal. 1037, 1057.

debtor under rule 5. For each alternative, however, the burden is upon the judgment-debtor to show sufficient cause. In the circumstances of the case before us sufficient ground, in my opinion, is not shown for stay of execution of the decree, whether we confine our attention to the allegations in the original petition or take them along with those contained in the supplemental affidavit of the 15th December, 1910. The conclusion follows that the first element essential for grant of stay of execution has not been established.

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The second question arises in connection with order XLI, rule 5, sub-rule (3), clause (c) of the Code of 1908. That clause provides that no order for stay of execution shall be made, unless the Court making it is satisfied that security has been given by the applicant for the due performance of such decree as may be ultimately binding upon him. Now, in the present case, there are two applicants, the infant represented by his guardian, who is manager under the Court of Wards, and the Collector of Shahabad, who represents the Court of Wards. It is stated that the infant has no property of his own, except the Dumraon Raj estate, the title to which is in controversy. The Collector of Shahabad also, who represents the Court of Wards, has no funds at his disposal as representative of the Court of Wards. Neither of the applicants, therefore, is able to furnish security as required by the Code. The learned counsels on their behalf have consequently intimated to this Court that they are able to furnish a bond by the Chief Secretary to the Government of Bengal for and on behalf of the Lieutenant-Governor of Bengal in Council, for and acting in the premises for and on behalf of the Secretary of State for India in Council. The guarantee offered is in the following form:—

“To

The Registrar of the High Court of Judicature at Fort William in Bengal in its Appellate Jurisdiction.

The security bond in stay of execution of decree, executed by the Secretary of State for India in Council witnesseth:

That in Title Suit No. 29 of 1909 in the Court of Second Subordinate Judge, Shahabad, wherein Kesho Prasad Singh is plaintiff, and (1) Maharaj Kumar Srinibash Prasad Singh, minor, of the Court

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of Wards, Bengal, (2) The Collector of Shahabad, and (3) Captain J. B. Rutherford, Manager, Court of Wards, are defendants, a decree was made on the 12th August, 1910, declaring the plaintiff to be entitled to the properties forming and known as the Dumraon Raj in the District of Shahabad, and directing the defendants to make over possession to the plaintiff of the said properties, and the Court of Wards to pay the costs of the suit, and further directing the Court of Wards to account to the plaintiff for all properties movable and immovable taken charge of by the Court of Wards in December 1907, as on behalf of the defendant No. 1, and of the profits arising therefrom since that date and to arise therefrom until the date of possession given to the plaintiff.

The defendants Nos. 1 and 2 have preferred an appeal to this Court from the said decree in the said suit, No. 29 of 1909, which appeal is still pending.

Now the defendants Nos. 1 and 2 have made an application praying for stay of execution and have been called upon to furnish security.

Accordingly I, the Secretary of State for India in Council, stand security and covenant that if the said decree of the Court of the Second Subordinate Judge, Shahabad, be confirmed or varied by the Appellate Court, the said defendants shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by them thereunder, and if they should fail therein, then I, the Secretary of State for India in Council, will be liable to pay the same.

In witness, the hand of Chief Secretary to the Government of Bengal for and on behalf of the Lieutenant-Governor of Bengal in Council, for and acting in the premises for and on behalf of the Secretary of State for India in Council, this day of January one thousand nine hundred and eleven."

The learned counsel on behalf of the decree-holder enquired whether this guarantee was proposed to be given by the Secretary of State in Council with the concurrence of a majority of votes at a meeting under section 40 of the Statute 21 and 22 Victoria, Chapter 106. The learned counsel for the judgment-debtors appellants could not furnish any information on the subject.

The learned Advocate-General, who appeared as *amicus curiæ* on behalf of the Secretary of State for India, declined at one stage to give any information in the matter; but when the Court intimated to him that the guarantee would not be considered, unless the Court was satisfied that the requirements of the Statute have been strictly observed, the learned Advocate-General put in a copy, the following telegram, dated



the 31st December, 1910, from the Secretary of State for India to His Excellency the Viceroy:—

“Your telegram, dated 22nd December, Dumraon Estate. I sanction security being furnished by Government of Bengal to the extent required by High Court of Judicature for stay of execution pending final decision on appeal. I sanction also your proposal as to Wards’ maintenance and provision of funds for prosecuting appeal.”

The learned counsel for the decree-holder then contended that the guarantee ought not to be accepted substantially for two reasons: namely, *first*, that it was not shown to have been given by the Secretary of State for India in Council with the concurrence of a majority of votes at a meeting; and, *secondly*, that even if the provisions of section 40 of the Government of India Act, 1858, were shown to have been strictly followed, the guarantee was *ultra vires*, because it was not a contract for the purposes of the Government of India within the meaning of section 2 of the Statute, and was generally in excess of the authority delegated by the Crown to the Secretary of State for India in Council. In answer to these contentions, it was argued by the learned Advocate-General that it was not competent to any Municipal Court to determine the validity of the guarantee, that if a Municipal Court has such jurisdiction, it ought to refrain from an enquiry into the validity of the guarantee, because once the guarantee has been given, the Secretary of State for India in Council cannot challenge its validity, and that in any event it is improbable that after such guarantee has been given, the Secretary of State for India in Council will repudiate the same, should occasion arise to enforce it. It was further contended that the Court need not ascertain whether there has been strict compliance with the provisions of section 40 of the Government of India Act, 1858, and that the guarantee is not beyond the scope of the authority conferred upon the Secretary of State for India in Council by the Crown under that Statute. It is necessary to consider in the first place the preliminary points urged by the learned Advocate-General. The first of these contentions in bar is that a Municipal Court has no jurisdiction to investigate the validity of the guarantee, because this was an act of State. It is not easy to follow how,

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when the Secretary of State for India in Council chooses to give a guarantee for the due performance of a decree obtained by one private individual *A* against another private individual *B*, the act can be appropriately designated as a Sovereign act. As Lord Justice Fletcher Moulton observed in *Salaman v. Secretary of State for India* (1), an act of State is essentially an exercise of Sovereign power, and because it is an exercise of Sovereign power it cannot be challenged, controlled, or interfered with by Municipal Courts; but if an act is relied on as being an act of State and as thus affording an answer to claims made by a subject, the Courts must decide whether it was in truth an act of State and what was its nature and extent. The true view of an act of State appears, observed the same learned Judge, to be that it is a catastrophic change constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected. Its duty is simply to accept the new departure. But, although this be so, the principles of interpretation applicable to an act of State are not necessarily the same as those which apply to other acts. For instance, if an act of State be expressed in a document purporting to confer benefits upon an individual, it by no means necessarily follows that there is any intention to create a contract, or that the document should be construed by the same canons of interpretation as would be adopted in the case of a contract between two individuals. If this be the true view of the nature of an act of State, it is not easy to appreciate how the offer of a guarantee by the Secretary of State for India in Council can be appropriately designated as an act of Sovereign power. But if that were its true character, and if for that reason the Municipal Courts were deprived of all jurisdiction in respect of the matter, the decree-holder respondent would be justly entitled to maintain the position that a guarantee of this character ought not to be accepted for purposes of stay of execution. In my opinion, the true view of the situation is that when the Secretary of State for India in Council offers

(1) [1906] 1 K. B. 613, 639.

a guarantee for the due performance by the appellant of any decree that might be made against them and in favour of the decree-holder respondent, the Municipal Courts have not only jurisdiction, but it is their duty to determine, when invited by the party against whom an order for stay is sought, to do so, whether the guarantee is valid and would be enforceable if the occasion arose for its enforcement.

The argument upon the second point in bar falls into two branches. It is first suggested that the Court ought to refrain from an enquiry into the validity of the guarantee, because once the guarantee has been given, it would not be open to the Secretary of State for India in Council to question its validity. It is suggested, in the second place, that it is not likely that after the guarantee has been given, the Secretary of State for India in Council would repudiate it, if occasion arose for its enforcement. In so far as the first branch of this contention is concerned, I am unable to uphold it as well-founded. As pointed out in the *Laws of England*, edited by Lord Halsbury, Vol. 13, section 537, a party cannot by representation any more than by other means raise against him an estoppel so as to create a state of things which he is under a legal disability not to do. No person can by his conduct or otherwise waive or renounce a right to perform a public duty or estop himself from insisting that it is his right to do so. The doctrine has been frequently applied to cases of corporate bodies, and it has been ruled in decisions of the highest authority that a corporate body cannot be stopped from denying that they have entered into a contract which it was *ultra vires* for them to make; no corporate body can be bound by an estoppel to do something beyond its power or to refrain from doing what is its duty. For illustrations, reference may be made to *Fairtitle v. Gilbert* (1), *Attorney-General v. Dublin Corporation* (2), *Ashbury Railway Carriage Co. v. Riche* (3), *Grant v. Secretary of State for India* (4), *Mac*

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(1) (1787) 2 T. R. 169;

1 R. R. 455.

(2) (1841) 1 Dr. &amp; War. 545.

(3) (1875) L. R. 7 H. L. 653.

(4) (1877) 2 C. P. D. 445.

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*Alister v. Bishop of Rochester* (1), *Dunn v. Queen* (2), *Great North-West Central Railway v. Charlebois* (3), *Islington Vestry v. Hornsey Urban District Council* (4). It may be observed here incidentally that section 5 of the Government of India Act, 1859, to which reference was made by the learned Advocate-General, is of no real assistance, because if a contract is *ultra vires*, no liability under such a contract is imposed upon the Secretary of State in Council and none can consequently pass to his successors. It was further suggested, however, by the learned Advocate-General that this principle is restricted in its application to Corporations strictly so called, and that it does not apply to the Secretary of State for India in Council. The distinction suggested is, in my opinion, without any foundation. As was observed by Lord Esher, M.R., in *Dunn v. Queen* (5), if any authority representing the Crown were to make a contract so as to derogate from the powers of the Crown, the contract could not be enforced against the Crown. It is well settled that the effect of the doctrine of equitable estoppel does not apply to the Government in the case of unauthorised acts or omissions on the part of its officers and agents, nor are public officers concluded by acts done in their official capacity. The principle is perfectly intelligible that, though individuals may be estopped by the unauthorised acts of their agents apparently within the scope of their agency, the Sovereign power ought not to be bound by the *ultra vires* acts of its agents: see *Filor v. United States* (6). Now what is the position of the Secretary of State for India in Council. The powers and duties of the Secretary of State for India in Council are defined by Statute, and the Secretary of State for India in Council is not competent to act in excess of the authority delegated to him by the Crown. As Lord Justice James observed in *Kinlock v. Secretary of State for India in Council* (7), if we look at the Government of India Act of 1858, which put an end to the East India Company, all the pro-

(1) (1880) 5 C. P. D. 194.

(4) [1900] 1 Ch. 695.

(2) [1896] 1 Q. B. 116, 118.

(5) [1896] 1 Q. B. 116.

(3) [1899] A. C. 114.

(6) (1869) 9 Wallace 45.

(7) (1880) 15 Ch. D. 1, 8.

perty and assets of the East India Company were not transferred to any body-corporate which were successors to the East India Company, but were vested in the Crown in trust for the Government of India, and the words "the Secretary of State for India in Council," which are mere words providing that that officer and department would be capable of suing and being sued, are nothing more than words indicating the mode by which the Government of India is to sue and be sued, that is to say, the mode in which the Indian Exchequer might itself institute proceedings and might be made the subject of proceedings for the purpose of determining the rights between any of Her Majesty's subjects. Lord Justice James added that there was no such person in truth as the Secretary of State for India in Council, and there was no such body known except as a name for suing and being sued on behalf of the Indian Exchequer. This decision of the Court of Appeal was taken on appeal to the House of Lords, *Kinloch v. Secretary of State for India in Council* (1), and was ultimately affirmed. In my opinion, there is no room for reasonable doubt that the powers and obligations of the Secretary of State for India in Council are defined by the Statute, and that if he exceeds the authority delegated to him, the holder of the office for the time being when sued in a Municipal Court is entitled to urge by way of defence the *ultra vires* character of the transaction. In this view of the answer which ought to be given to the first branch of the argument, it is not necessary to deal seriously with the second branch that the Court ought to refrain from an enquiry into the validity of the guarantee, because it is improbable that its validity will ever be questioned on behalf of the Secretary of State for India in Council. Instances are not unknown in which when an attempt has been made to enforce agreements alleged to have been entered into by high officers of State, their validity has been successfully impeached by the Secretary of State for India in Council on the ground that the agreements were *ultra vires*: *King v. Secretary of State* (2), *Sarat Chandra Das v. Secretary of State* (3).

(1) (1832) 7 App. Cas. 619.

(2) (1908) 13 C. L. J. 357.

(3) (1910) I. L. R. 38 Calc. 378.

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See also *Shivabhajan v. Secretary of State* (1), and *Municipal Corporation of Bombay v. Secretary of State* (2). In any event if the guarantee is unenforceable in a Municipal Court, the decree-holder cannot legitimately be asked to accept it on the assumption that its validity is not likely to be challenged if occasion arises for its enforcement. In my opinion, the grounds suggested why the Court should refrain from an enquiry into the question of the validity of the guarantee offered are wholly unsubstantial, and the Court would fail in its obvious duty if a security were accepted without question, when it is fairly obvious that grave complications might result if occasion arose for the enforcement of the security. I must now proceed to examine the grounds urged by the learned counsel for the decree-holder in support of his contention that the guarantee offered ought not to be accepted for stay of execution of the decree against the judgment-debtors.

The first objection taken by the learned counsel for the decree-holder is that the security offered is not shown to have been sanctioned by the Secretary of State for India in Council with the concurrence of a majority of votes at a meeting. This, in my opinion, is a valid objection. The powers of the Secretary of State for India in Council are, as I have already stated, defined by the Statute, and strict compliance with its provisions is essential. Section 40 of the Government of India Act, 1858, lays down—I quote only so much of the section as is necessary for the present purpose—that the Secretary of State in Council with the concurrence of a majority of votes at a meeting shall have full power to enter into any contracts whatsoever as may be thought fit for the purposes of the Act. I need not repeat that the learned Advocate-General at one stage declined to give any information on the subject, but subsequently placed before us a communication that had passed between His Majesty's Secretary of State and His Excellency the Viceroy. The terms of the telegram, however, are not explicit, and the learned Advocate-General was unable to furnish to the Court precise

(1) (1904) I. L. R. 28 Bom. 314.

(2) (1904) I. L. R. 29 Bom. 580.



information upon this fundamental point. In the events which have happened, I must decline to act upon the assumption that the Secretary of State in Council, with the concurrence of a majority of votes at a meeting, proposes to give this guarantee. The Secretary of State for India in Council is not a party to the suit or to the decree under appeal, nor is he a party to these proceedings for stay of execution, and if a security is offered on his behalf for the benefit of the judgment-debtors, the decree-holder and the Court are plainly entitled to have definite information that the provisions of the Statute have been strictly complied with. Such information has not been given, and, therefore, the first objection taken by the learned counsel for the decree-holder has not been successfully met.

The second objection taken by the learned counsel for the decree-holder is that the security offered is *ultra vires*. Here the learned counsel based his contention upon two grounds, namely: *first*, that under section 40 of the Government of India Act, 1858, the Secretary State for India in Council may enter into any contract for the purposes of the Act, that is, for the purposes of Government of India alone, as mentioned in section 2 of the Statute; *secondly*, that, under sections 39, 40, 41, 42 and 65 of the Statute, only such liabilities undertaken by the Secretary of State for India in Council may be enforced against the revenues of India, as might have been enforced against the East India Company, if the liabilities had been lawfully contracted and incurred by the said company, and the revenues of India shall not be applied to any other purpose whatsoever. The learned counsel for the decree-holder contended that, tested from each of these points of view, the guarantee offered on behalf of the Secretary of State for India in Council is *ultra vires* and unenforceable in law. In answer to these contentions the learned Advocate-General argued that the guarantee offered was for the purposes of the Government of India within the meaning of section 2 of the Government of India Act, 1858, because on the principle recognised in the cases of *Wellesley*

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v. *Beaufort* (1), *In re Spence* (2), and *Queen v. Gyngall* (3), it is the duty of the Crown to protect infants, the doctrine which is the foundation of the statutory provisions embodied in the Court of Wards Act, 1879. The learned Advocate-General further contended that the powers of the Secretary of State for India in Council to deal with the revenues of India were wider than those possessed by the East India Company, and that the judicial decisions upon which reliance is placed on behalf of the decree-holder, namely, *P. & O. Steam Navigation Company v. Secretary of State* (4), *Nobin Chunder Dey v. Secretary of State* (5), *Secretary of State v. Hari Bhanji* (6) and *Shivabhajan v. Secretary of State* (7) are clearly distinguishable. Reference was also made in this connection to sections 1, 2 and 5 of the Government of India Act, 1859 (Stat. 22 and 23 Vict., Chap. 41). Now, in so far as the first reason assigned by the learned counsel for the decree-holder is concerned, it lies in a very narrow compass. It cannot be seriously disputed that for the validity of a contract entered into by the Secretary of State for India in Council under section 40 of the Government of India Act, 1858, it is an essential pre-requisite that the contract should be for the purposes of the Act; and it may be observed that the same remarks apply to contracts entered into by the Governor-General in Council and the other statutory bodies mentioned in section 1 of the Government of India Act, 1859, in exercise of the authority delegated to them thereby. Now the expression "for the purposes of the Act" or "for the purposes of the Government of India" means, as was pointed out by Sir Lawrence Jenkins, C.J., in *Shivabhajan v. Secretary of State* (7), "the superintendence, direction, and control of the country." Consequently, if a question arises whether a particular contract may be rightly described as made for the purposes of the Government of India, the answer must depend upon its scope and character. Now in the case before

(1) (1827) 2 Russell 1, 20.

(2) (1847) 2 Phillips 247.

(3) [1893] 2 Q. B. 232.

(4) (1861) 2 Bourke 166.

(5) (1875) I. L. R. 1 Cal. 11.

(6) (1882) I. L. R. 5 Mad. 273.

(7) (1904) I. L. R. 28 Bom. 314.

us, what is the scope and character of the guarantee offered on behalf of the Secretary of State for India in Council? The Secretary of State for India in Council covenants that the defendants in the suit shall duly act in accordance with the decree of this Court and shall pay whatever may be payable by them thereunder, and if they should fail therein, the Secretary of State for India in Council will be liable to pay the same. If therefore if we look to the essence of the matter, it reduces to this. The Court of Wards is entitled, under statutory powers, to take charge of the property of an infant who has been adjudged a Ward of the Court. The officers of the Court of Wards take possession of an estate which does not belong to the infant who has been declared a Ward of the Court. The officers keep out of possession the rightful owner who after protracted litigation successfully asserts and establishes his title in the ultimate Court of Appeal. Meanwhile, the officers of the Court of Wards continue in possession of the estate and spend the income on the assumption that it belongs to the Ward of the Court. The Court of Appeal not only makes a decree for possession in favour of the successful owner, but also directs the defendants in the suit to account for the profits they have unlawfully spent. The Secretary of State for India in Council undertakes to pay out of the revenues of India the sums unlawfully spent by the defendants out of the estate which is finally adjudged never to have belonged to the infant. The question is, is a security given for this purpose by the Secretary of State for India in Council an engagement made for the purpose of the Government of India? Upon the arguments addressed to us by the learned Advocate-General, I am not convinced that a contract of this character can be appropriately described as a contract for the purposes of the Government of India. I cannot appreciate how the case is strengthened by a reference to the familiar doctrine that infants are entitled, in respect of their person and property, to the protection of the State. In the case before us, if the decision of the Court below is ultimately affirmed in substance, and that is the contingency in which occasion will

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arise for the fulfilment of the obligation offered to be undertaken by the Secretary of State for India in Council, the position will be that the infant defendant had no property at all, that there was never any question of protection of such property, and that the officers of the Court of Wards unlawfully took possession of the estate of which the plaintiff has been adjudged to be the rightful owner, and spent the income of his estate on the assumption that it could be rightly applied for the benefit of the infant. After the most anxious and careful consideration I have been able to bestow on the matter, I am not prepared to uphold the position that a contract of this description falls within the scope of section 40 of the Government of India Act, 1858. In the second place, in so far as the other reason urged by the learned counsel for the decree-holder in support of his contention that the guarantee is *ultra vires* is concerned, it opens up a question of much wider scope than what is essential for the purpose of the case before us. The learned counsel has contended broadly that if occasion arises for the enforcement of the security, and an objection is taken as to its validity, the test to be applied will be, whether the security would have been valid if it had been given by the East India Company, and that, tested from this point of view, the security ought to be pronounced unenforceable. I reserve my opinion upon the question raised, because, apart from the circumstance that its decision is not necessary for our present purposes, the judicial pronouncements which relate to the liability of the Secretary of State for non-contractual obligations, and upon which reliance is placed, are by no means uniform, while the question of the extent of the powers of the East India Company is necessarily not altogether free from doubt and difficulty. I, therefore, prefer to rest my decision upon the grounds already explained. I may add that objection was also taken as to the form of the security and the proper mode of its execution; these are obviously questions of minor importance, and if it was necessary to do so, the difficulty suggested might no doubt have been removed.

I may add that at one stage of the arguments, reference was made to section 1 of the Government of India Act, 1859, and we are invited to accept the security as given by the Government of India alone. Here, also, the applicants are in a difficulty, because no information was given to us by the learned Advocate-General as to the elements which have to be considered before a contract under that section can be pronounced valid. In addition to this, there is the difficulty that any contract entered into by the Government of India, must, in order that it may be valid, be for the purposes of the Statute.

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Besides the considerations mentioned, there are, in my opinion, two other points which must carry weight in the decision of this matter. In the first place, it is the well-settled practice of this Court that when security is offered for stay of execution, it is not accepted unless its legal validity is reasonably free from doubt. It is perfectly true that security has to be furnished to the satisfaction of the Court. But, when the Court accepts a security, it does so for the possible benefit of the decree-holder, and it would in my opinion, be obviously unreasonable to accept a security the validity of which is by no means free from doubt and the enforcement of which may lead to protracted litigation. In the second place, section 145 of the Civil Procedure Code of 1908 lays down that where any person has become liable as surety for the performance of any decree or any part thereof for the payment of any money, or for the fulfilment of any condition imposed on any person under an order of the Court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself *personally* liable in the manner herein provided for the execution of decrees, and such persons shall, for the purposes of appeal, be deemed a party within the meaning of section 47. In the case before us the Secretary of State for India in Council does not make himself personally liable, nor is any specific property hypothecated. Consequently, if the security is accepted and occasion arises



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for its enforcement, section 145 might be deemed inapplicable, with the result that the decree-holder might be driven to an expensive and protracted regular suit to enforce the security. In my opinion it would be unreasonable to place the decree-holder in a position of such embarrassment. It may be observed here incidentally that under section 145 the surety who has rendered himself personally liable is treated as a party within the meaning of section 47 only for one specified and limited purpose, namely, for the purpose of appeal. In other words, if execution is taken out against the surety who has rendered himself personally liable, and an order is made against him, the order may be treated, under section 47, as one between the parties to the suit and consequently appealable. But the surety who has rendered himself personally liable is not to be deemed a party for any other purpose; consequently, in the case before us, even if we were to hold that the security offered was valid in law, that would not amount to an adjudication between the decree-holder and the Secretary of State for India in Council, so as to bar a determination of the question if it should be raised in a suit brought for the enforcement of the security.

In my opinion, for the reasons stated, the application for stay of execution ought to be refused, but I desire it to be distinctly understood that if the decree-holder applies to execute the decree, the Court will require security from him under rule 6 of order XLI of the Code as he has himself, through his learned counsel, offered to furnish. It is to be observed, further, that this matter has been argued before us only as regards the execution of the decree for delivery of possession, and the present decision relates to that point only. If the decree-holder should apply for execution as regards costs or for an enquiry into the mesne-profits, it will be open to the appellants to apply to this Court again for stay in respect of those two matters. The Rule must therefore be discharged, with costs.

TEUNON J. The suit out of which the present application arises is one brought to recover possession, with mesne-



profits of the estate known as the Dumraon Raj, on establishment of title.

It appears that the last Maharajah of Dumraon, Sir Radha Prasad Singh, Bahadur, died on the 5th of May, 1894. Before his death he had executed a will by which he devised the Raj to Maharani Beni Prasad Koeri for the term of her natural life and also authorised her to adopt unto him a son. The Maharani died on the 13th of December, 1907, and the allegations of the defendants are that on the day preceding her death she had taken in adoption the first defendant previously known as Jung Bahadur and thereafter known as Maharaj-kumar Srinibash Prasad Singh, and that since her death the Court of Wards has been in charge of the properties on this minor defendant's behalf. The plaintiff's allegations, *inter alia*, are that no adoption in fact took place, and that he as the heir-at-law is entitled to succeed to the properties.

The suit having been decreed in plaintiffs' favour, the minor defendant, and the Collector of Shahabad, who was impleaded as representing the Court of Wards, have appealed to this Court and have also made the present application under order XLI, rule 5, of the Code of Civil Procedure, 1908, for stay of execution. By the decree the Courts of Wards has been made liable for mesne-profits and costs, but at the hearing of this Rule nothing has been said with regard to this part of the decree, and the application has therefore been treated and may be considered as one made for stay of execution only in so far as delivery of possession is concerned.

In view of the terms of order XLI, rule 5, the facts of the case, and the contentions of the parties, the questions that arise for determination are two, namely, (i) whether if the order for stay be not made substantial loss may result to the minor appellant, and (ii) whether the security offered by him is such as should be accepted.

On the first question the materials before us consist of two affidavits sworn in support of the petition, one on the 7th September and one on the 15th December, and two affidavits in reply thereto sworn by the plaintiff-respondent on the 1st

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and 19th December. Exception has been taken to the acceptance of the supplementary affidavit filed on behalf of the petitioners on the 15th December, and it would doubtless have been more in accordance with the rules of practice had the details given in the second affidavit been set out at length in the first. But the plaintiff-respondent has had a full opportunity of answering the second or supplementary affidavit, and as all four affidavits have been placed before us, we may with propriety decide on the materials thus furnished.

In his affidavits the plaintiff impeaches the management and expenditure of the Court of Wards, but his allegations or suggestions appear to be founded mainly on some misconception of the figures and statements contained in the official reports to which he refers. This much at least appears to be clear that the administration of the estate by the Court has been more efficient and more economical than the management of the late Maharani, and in all probability would have been even more successful but for the existence of the dispute which has given rise to the present litigation. In any case I can find no reason to suppose that if the estates be handed over to the plaintiff, his management will be as beneficial to the minor defendant as the management of the Court of Wards. From the second or supplementary affidavit filed on behalf of the defendant we find that survey and settlement proceedings under the Bengal Tenancy Act are in progress in some 900 villages, and that there are many rent suits pending. It is essential that in these suits and proceedings the interests of the estate should be efficiently safe-guarded; but, apart from these details, to my mind that a temporary transfer of possession in the case of an extensive property such as the one now in question will dislocate the management and in all probability cause grave loss to the minor defendant, if eventually adjudged to be the true owner, is a proposition which requires but little evidence in its support. No doubt on behalf of the plaintiff-respondent it has been stated that when he seeks possession he will under rule 6 of order XLI of the Code offer sufficient security for the restitution of the property with the rents and profits

realised during the period for which he may remain in possession. But the ascertainment of these mesne profits, I am of opinion, will necessarily be a matter of some time, expense, and difficulty, and I am further unable to discard from consideration the very possible waste and injury which may result should the estate, at this stage, be handed over to the plaintiff-respondent, who on his own showing is carrying on this litigation by means of borrowed capital.

For these reasons, I am of opinion that it is of great importance that, if possible, possession should not be disturbed until the question of title involved in the suit is finally decided, and I am satisfied that if execution be not stayed, substantial loss may result to the appellant.

This brings me to the second question, namely, whether the security offered by the applicants is such as should be accepted. The security offered is a guarantee or simple bond to be executed by the Chief Secretary to the Government of Bengal for and on behalf of the Lieutenant-Governor in Council acting for and on behalf of the Secretary of State for India in Council.

It is not disputed that the revenues of India will amply suffice to meet any demands that may accrue under this bond, and it may be conceded, as urged by the learned Advocate-General, that the Government of India's guarantee would be readily accepted by any ordinarily prudent man of business. But the decree-holder, it appears, has been otherwise advised, and on his behalf it is contended that a bond of this nature is one which, if occasion arises, the Courts will hereafter be unable to enforce, and it is urged that, however improbable the repudiation by the Secretary of State of such a solemn undertaking may be, the decree-holder should not be required by the Court to accept a security which, if the occasion arises, he may be unable to enforce by legal proceedings.

I agree with my learned brother and generally for the reasons given by him that the opposition of the decree-holder to the acceptance of the security makes it incumbent upon the Court to inquire whether the bond in question is valid in law and capable of enforcement in the Municipal Courts

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Now it seems reasonably clear that the bond under consideration can be enforced against the Secretary of State for the time being, as a charge upon the revenues of India, only if it is found to be within the scope of the authority conferred upon the Secretary of State, the Governor-General in Council or the Local Government by the Government of India Act, 1858, and the Government of India Act, 1859, and is, moreover, entered into in compliance with the provisions of the said Statutes.

The objections then taken to the bond on behalf of the decree-holder are four in number, namely, (i) that under the Government of India Act, 1858, the power of the Secretary of State to deal with the revenues of India is no wider than the power previously possessed by the East India Company, and that the proposed bond or contract is one which could not have been lawfully entered into by that company were it now in existence; (ii) that the proposed bond or contract is not one for the purposes of the administration or government of India within the meaning of sections 2, 40, and 42 of the said Act; (iii) that if the bond be considered as one entered into by the Secretary of State, it has not been shown that he is acting with the concurrence of a majority of votes at a meeting of his Council as required by section 40 of the Act; and (iv) that if the bond or contract be considered as one entered into by the Government of India or the Government of Bengal in exercise of the powers conferred by section 1 of the Government of India Act, 1859, it has not been shown that the contract does not contravene the restrictions which under the same section the Secretary of State in Council is authorised to impose.

In support of the first objection, learned counsel for the decree-holder relies upon sections 39, 40, 41, 42 and 65 of the Government of India Act, 1858, refers to the Government of India Act, 1833, cites the cases of *Nobin Chunder Dey v. Secretary of State* (1), *Secretary of State v. Hari Bhanji* (2), and *Shivabhajan v. Secretary of State* (3), and also invites

(1) (1875) I. L. R. 1 Calc. 11. (2) (1882) I. L. R. 5 Mad. 273.

(3) (1904) I. L. R. 28 Bom. 314.

reference to the Charters of the East India Company. I am of opinion that I need not discuss this objection at length, for it appears to me to be reasonably clear that, whatever may be the case with respect to other rights and powers and to liabilities arising otherwise than out of contract, section 40 of the Statute does not in respect of contracts restrict the Secretary of State to the position previously held by the East India Company, but authorises him to enter into any contract whatsoever for the purposes of the Act, that is to say, for the purposes of the government of India by and in the name of His Majesty. The effect of sections 42 and 65 in this connection then appears to be that on all contracts entered into by the Secretary of State in pursuance of section 40 of the Act the Secretary of State for the time being may be sued, and the debts arising out of such contracts become chargeable upon the revenues of India.

In support of the second objection it is urged that a guarantee given for the due performance by a private person of a decree passed against him and in favour of another private person can in no sense be said to be a contract made for the purposes of the government of India.

But in the present case the principal defendant-appellant is a minor, and it cannot be disputed that the protection of the person and property of infants is one of the functions of every civilized government. Pending the decision of the ultimate Court of Appeal, Government, in my opinion, cannot be said to be wrong in acting on its belief that the estate belongs to the infant in possession. Moreover, the estate now in question, we are informed, extends over some 800,000 acres, and comprises thousands of villages, and the case thus involves the interests of an enormous body of tenantry. If, therefore, the Secretary of State or the Government of India be of opinion that it is in the best interests of the administration that, pending the ultimate decision of the highest Court of Appeal, present possession over this vast area should be maintained, it cannot, in my opinion, be successfully denied that the security offered in order to effect

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this object is being offered and the contract is being entered into for the purposes of government. For these reasons I should overrule the first and second objections taken by the decree-holder to the security under consideration.

I now come to the third and fourth objections. Section 40 of the Government of India Act, 1858, requires that the Secretary of State should enter into contracts for the purposes of government with the concurrence of a majority of votes at a meeting of his Council. The learned Advocate-General, who, at our instance, has appeared in this matter on behalf of Government, has been able to show us that the furnishing of security by the Government of Bengal has been sanctioned by the Secretary of State, but he has not found himself in a position to say whether this sanction has been given with the concurrence of a majority of votes at a meeting of his Council.

Section 1 of the Government of India Act empowers the Government of India, and the Local Governments, within the limits of their respective governments to enter into any contract whatsoever for the purposes of the Government of India Act, 1858, that is, as I have already stated, for the purposes of the government of India by and in the name of His Majesty. At the same time the exercise of the power thus conferred is made subject to such restrictions as the Secretary of State in Council may from time to time prescribe. In respect of contracts such restrictions, it is conceivable, may be either in respect of their value, or in respect of their kind or character. The learned Advocate-General has been unable to give the Court any information regarding the restrictions, if any, which the Secretary of State has seen fit to impose. In the absence of information on the points stated, I must agree with my learned brother in holding that the third and fourth objections taken to the proffered security by the decree-holder have not been successfully met and must prevail.

It is further to be observed that, having regard to the language of section 145 of the Code, the security under consideration, it appears fairly clear, may be enforced only by a regular suit.



This state of the law, the opinion entertained by my learned brother on the second objection of the decree-holder, and the fact that any decision arrived at by us in these proceedings would apparently not be binding upon the Secretary of State in a suit brought, should occasion arise, to enforce the security, afford additional reasons why I should not, in this matter of discretion, differ from my learned brother. I therefore agree in discharging the rule.

S. C. G.

*Rule discharged*

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## APPELLATE CIVIL.

*Before Mr. Justice Chitty and Mr. Justice N. R. Chatterjea.*

JAIWANTI KUMRI

v.

GAJADHAR UPADHYA.\*

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 April 11.

*Guardian—Minor—Guardians and Wards Act (Act VIII of 1890) ss. 8, 13—Applications by mother and grand-mother—Appointment of Nazir as guardian of the property of the minors, by Court—Purdanashin Lady—Recording of Evidence.*

Where a mother and grand-mother of two minors separately applied to be appointed guardian of the persons and property of the minors and during the pendency of their applications it was agreed that a certain person should be appointed guardian of the property, but he refused to take up the appointment, the District Judge without holding an enquiry into the respective merits of the applications made an order appointing the Nazir of the Court to be the guardian of the property of the minors:—

*Held*, that the Court had no power to make an order appointing a guardian except on a substantive application under section 8 of the Guardians and Wards Act (VIII of 1890), and that the appointment of the Nazir was *ultra vires*.

Under section 13 of the Guardians and Wards Act (VIII of 1890) the Court is bound to hear such evidence as may be adduced in support of or in opposition to the application, before passing an order.

The mere fact of the mother being a *purdanashin* lady was no obstacle to her being appointed guardian of the property; the safe custody of the property and its due administration could be sufficiently guaranteed by security being taken from the proposed guardian by the Court.

\* Appeal from Original Order, No. 608 of 1910, against the order of J. C. Twidale, District Judge of Bhagalpore, dated Dec. 6, 1910.

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APPEAL by Musummat Jaiwanti Kumri.

Musummat Jaiwanti Kumri, the mother of the minors, applied before the District Judge to be appointed guardian of the person and property of the minors. A similar application was made by the grandmother of the minors. On the 22nd of November, 1910, both the mother and the grandmother agreed that Babu Dalip Narain Singh should be appointed guardian of the property of the minors. Babu Dalip Narain Singh, however, refused to take up the appointment. The learned District Judge then, without holding an enquiry into the respective merits of the applications of the mother and the grandmother, made an order appointing the Nazir of his Court to be guardian of the property, and while passing the order of appointment, remarked in his order that both the ladies, being *purdanashin*, were for that reason not very suitable persons to be guardians of a large property like that in question in the case. From this order Musummat Jaiwanti Kumri alone appealed to the High Court.

*Dr. Rash Behary Ghose, Babu Khetra Mohan Sen and Babu Jogendra Nath Dutt*, for the appellant.

*Babu Dwarka Nath Chakravarti and Babu Lal Mohan Ganguli*, for the respondent.

CHITTY AND N. R. CHATTERJEA JJ. This is an appeal by Musummat Jaiwanti Kumri from an order of the learned District Judge of Bhagalpur refusing her application to be appointed guardian of the property of her minor sons, Babu Jagdish Prosad and Babu Jogesser Prosad.

It appears that along with the petition of Musummat Jaiwanti Kumri, the mother of the minors, the District Judge had before him a petition of Musummat Champabati Kumri, the grandmother of the minors, that she should be appointed. On the 22nd of November, 1910, the ladies were agreed that Babu Dalip Narain Singh should be appointed guardian of the property of the minors. That gentleman was asked whether he

would undertake the charge but he declined. The learned District Judge then without holding any enquiry into the respective merits of the applications of the mother and the grandmother, made an order, which is in form a permanent order, but which from his letter would appear to be a temporary order, appointing the Nazir of his Court to be the guardian of the property of the minors. He appointed the mother, Musummat Jaiwanti Kumri, to be the guardian of the person of the minors, and to that no objection is taken. It is conceded by the learned pleaders for both the ladies that the District Judge's order cannot possibly stand. A Court has no power to make an order appointing a guardian of a minor, except on a substantive application (see section 8 of the Guardians and Wards Act, 1890). The appointment, therefore, of the Nazir was *ultra vires*.

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With regard to the refusal of Musummat Champabati Kumri's application, she has filed no appeal against the order of the learned District Judge, and there is therefore no application of hers at present before the Court. With regard to the application of Musummat Jaiwanti Kumri, the mother, it is not seriously contended that there ought not to be a proper enquiry into her case. Section 13 distinctly prescribes that "on the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application." The learned District Judge has as yet taken no evidence on either side. In his order of the 22nd of November he remarks that "both the ladies are *purdanashins* and are for that reason not very suitable guardians for a large property like that in question in this case." We ought to point out that the mere fact of the mother being a *purdanashin* lady is no obstacle to her being appointed guardian. It is true that a *purdanashin* lady may not be able to personally supervise the management of the property, but the safe custody of the property and its due administration may be sufficiently guaranteed by security being taken from the proposed guardian by the Court.

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The grandmother, Musummat Champabati Kumri, has made very definite allegations against her daughter-in-law in her petition of objection. Those should be enquired into by the District Judge, recording the evidence on both sides.

With these remarks we set aside the order of the learned District Judge and send down the case for him to deal with the application of Musummat Jaiwanti Kumri on the merits.

Each party will bear his or her own costs of this appeal.

We direct that the record be sent down at once.

S. A. A. A.

*Appeal allowed;  
case remanded.*

## CRIMINAL REVISION.

*Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.*

1911  
June 15.

KANGALI SARDAR

v.

BAMA CHARAN BHATTACHARJEE.\*

*Jurisdiction of High Court—Power to revise an order of acquittal at the instance of a private party—Decision on a point of local jurisdiction and not on the merits—Criminal Procedure Code (Act V of 1898) ss. 423, 439 (5)—Practice.*

Section 439 (5) of the Criminal Procedure Code does not bar the jurisdiction of the High Court to interfere with an order of acquittal on an application made at the instance of a private party.

Where the Appellate Court set aside a conviction and sentence on the ground that the place of occurrence was outside the local limits of the trying Magistrate's jurisdiction, overlooking the provisions of s. 531 of the Code, the High Court set aside the order of acquittal and directed a re-hearing of the appeal.

What the Appellate Court has to find is whether the offence, of which an accused is convicted, has been made out not with reference to any dispute as to jurisdiction, but on the merits and in accordance with the evidence.

On the 21st August, 1910, the petitioner lodged a complaint, under sections 143 and 379 of the Penal Code, against

\* Criminal Revision, No. 486 of 1911, against the order of W. B. Heycock, District Magistrate of Burdwan, dated Feb. 16, 1911.

Bama Charan Bhattacharjee, and Hiru Sheikh, before the Sub-Divisional Officer of Khulna, which was made over by him to Babu Prokash Chunder Dutt, a local Sub-Deputy Magistrate, for trial. The story for the prosecution was that Hiru with about 20 or 25 others cut and removed paddy from the complainant's land in Kastosali *chur* under the orders of Bama Charan, Hem Banerjee and Sasi Bharati, and that the complainant remonstrated with them whereupon some of them went to beat him and he ran away. The trying Magistrate convicted the two accused, on the 23rd November, 1910, and sentenced Bama Charan to a fine of Rs. 50, in default to one month's rigorous imprisonment, and Hiru to rigorous imprisonment for 45 days. They appealed to the District Magistrate of Burdwan who, by his order dated the 16th February, 1911, set aside the conviction and acquitted the appellants. The order was in the following terms:—

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"This case cannot stand for two reasons. The place of occurrence is alleged to be Kastosali *chur*. Kastosali *chur* lies within the criminal jurisdiction of the district of Nadia. Secondly, Kastosali *chur* is in the *khas* possession of Government, and a raiyatwari settlement has been made of the lands. The story of the prosecution witnesses must be false, if the place of occurrence and the land in dispute is actually in *chur* Kastosali."

I sent back the case to the S. D. O. with reference to these points. The S. D. O. examined a witness to show that village Kastosali not *chur* Kastosali was meant. I cannot accept this explanation in view of the statements of the witnesses. *Mouza* Kastosali is, it is true, in the criminal jurisdiction of this land. All the witnesses, however, say that the land in dispute is in *chur* Kastosali, a very different thing."

The petitioner thereupon moved the High Court and obtained the present Rule.

*Babu Atulya Charan Bose*, for the petitioner.

*Mr. K. N. Chaudhuri*, *Babu Hemendra Nath Sen* and *Babu D. N. Bagchi*, for the opposite party.

CASPERSZ AND SHARFUDDIN JJ. This Rule is directed against an order of acquittal by the District Magistrate of Burdwan sitting as an Appellate Court.



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BHATTACHARJEE.

A preliminary objection has been raised by the learned counsel showing cause that we ought not to interfere in revision with such an order, and he has cited the provisions of sub-section (5) of section 439 of the Criminal Procedure Code. That sub-section runs as follows:—"Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed." The contention is that, as Government alone could have appealed against the order of the District Magistrate, we ought not to interfere in revision. But this argument overlooks the words "at the instance of the party who could have appealed." We are not here dealing with an application for revision at the instance of Government. The petitioner is the complainant, and we entertain no doubt that we can deal with an order of this kind in accordance with the practice of this Court in a series of cases.

The order we propose to pass is one which is usually passed, that is to say, the District Magistrate must re-hear the appeal. He overlooked the provisions of section 531 of the Code, and based his judgment on the fact ascertained by local enquiry, not by the trying Magistrate but by the Sub-Divisional Officer, that the scene of occurrence was *chur* Kastosali, which is within the criminal jurisdiction of the neighbouring district of Nadia. The District Magistrate says: "The story of the prosecution witnesses must be false if the place of occurrence and the land in dispute is actually in *chur* Kastosali." We do not follow that reasoning. What the District Magistrate had to find, in a case under sections 143 and 379 of the Indian Penal Code, was whether those offences had been made out, not with reference to any dispute as to jurisdiction but on the merits and in accordance with the evidence. The District Magistrate has not properly considered the case.

We must, therefore, make the Rule absolute, set aside the order acquitting the accused persons, and direct the District Magistrate to re-hear the appeal.

E. H. M.

*Rule absolute.*



## CRIMINAL REVISION.

*Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.*

SUKHESWAR PHUKAN

*v.*

EMPEROR.\*

1911

June 16.

*Warrant—Witness—Rescuing from lawful custody—Warrant against a witness issued in the first instance without recording reasons in writing—Legality of warrant and arrest—Penal Code (Act XLV of 1860) s. 225B—Criminal Procedure Code (Act V of 1898) s. 90, Sch. V, Form VII—Practice.*

The issue of a warrant of arrest by a Magistrate against a witness in the first instance, drawn up in the terms of Form VII of Schedule V of the Criminal Procedure Code, but without recording his reasons in writing therefor, as required by s. 90 of the Code, is illegal; and a person rescuing the witness arrested on such warrant is not guilty of an offence under s. 225B of the Penal Code.

ONE Molaram Mohun filed a complaint before the Deputy Magistrate of Sibsagar alleging that certain persons, including one of the petitioners, had broken into his house and carried away his wife, Musammat Mahi, by force. The Magistrate thereupon directed a summons against the accused under s. 426 of the Penal Code. During the trial of the case he issued a warrant, drawn up on a printed form in the terms of Form VII of Schedule V of the Criminal Procedure Code, against Mahi for her attendance in Court, but he recorded no reasons in writing for believing that she would not attend on a summons. The constable, who was entrusted with the execution of the warrant, went to her house and arrested her, whereupon the petitioners released her and took her to the house of one of them. They were tried by a Bench of Honorary Magistrates at Sonari, and convicted and sentenced, under s. 225B of the Penal Code, to various terms of imprisonment. An appeal was preferred to the District Magistrate of Sibsagar.

\* Criminal Revision, No. 527 of 1911, against the order of A. Playfair, District Magistrate of Sibsagar, dated April 3, 1911.

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who, by his order, dated the 3rd April, dismissed the same. The petitioners then moved the High Court and obtained the present rule.

*Mr. P. Lall* and *Mr. N. C. Bardoloi*, for the petitioners.  
No one for the Crown.

CASPERSZ AND SHARFUDDIN JJ. The petitioners have been convicted under section 225B of the Indian Penal Code for resisting the execution of a certain warrant for the arrest of a witness, named Musammat Mahi, whose attendance was desired in the case, No. 610 of 1910. We granted this rule on the ground that the action of the Court issuing the warrant of arrest was illegal, and vitiated the subsequent proceedings including the conviction of the petitioners for resisting an invalid process. The warrant was issued under section 90 of the Criminal Procedure Code which provides that the Court must record its reasons in writing before adopting that extreme measure. It appears from the order sheet of the case, No. 610 of 1910, that no summons was issued on Musammat Mahi. Warrant was ordered in the first instance. That procedure appears to have been illegal inasmuch as, on the face of the order sheet, no reasons were recorded by the Court issuing the warrant. Nor has the Magistrate submitted any explanation to elucidate the matter.

On the warrant itself there is a printed form, in accordance with Form No. VII of Schedule V of the Code of Criminal Procedure, reciting that "whereas I have good and sufficient reasons to believe, that he (the witness) will not attend as a witness on the hearing of the said complaint unless compelled to do so," but the natural meaning of section 90 is that the Court should record its reasons in writing. The adoption of a stereotyped printed form is, in our opinion, not a sufficient compliance with the imperative language of the section. The printed form may be intended for the information of the person whom it is sought to arrest. But that is a different matter. We think, therefore, that the conviction is unsustainable.

We may add, that the incident appears to have been greatly magnified. Musammat Mahi duly appeared in Court and gave her evidence. The convictions and sentences are, therefore, set aside. We direct that the petitioners be discharged from bail. The rule is made absolute.

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*Rule absolute.*

E. H. M.

## CIVIL RULE.

*Before Mr. Justice Mookerjee and Mr. Justice Caspersz.*

KESHO PRASAD SINGH

v.

SRINIBASH PRASAD SINGH.\*

1911  
March 23.

*Injunction—Cases where injunction might be granted—Plaintiff out of possession—Prima facie claim to the disputed property—Irreparable injury.*

Where the plaintiff is out of possession and claims possession, the Court will refuse to interfere by grant of injunction against the defendant in possession under a claim of right; but where the threatened injury will be irreparable, an injunction will lie at the instance of a complainant out of possession.

No injunction should be granted in a case where there is no foundation for any suggestion that the defendants are about to commit an act in the nature of waste.

Where the plaintiff has another adequate remedy, and where if an injunction were granted it would be of the vaguest description, no injunction ought to be granted in such cases.

RULE obtained by the plaintiff, Kesho Prasad Singh.

The plaintiff brought a suit for recovery of possession of a large estate, known as the Dumraon Raj, on declaration of his title thereto, against the defendants, Srinibash Prasad Singh and another. The suit of the plaintiff was decreed in the Court of first instance. Defendant Srinibash Prasad, who is a minor under the Court of Wards, preferred an appeal to

\* Civil Rule, No. 1149 of 1911, in connection with Appeal from Original Decree, No. 441 of 1910, under section 45 of the Specific Relief Act.

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the High Court. During the pendency of the appeal, the plaintiff-respondent obtained this Rule calling upon the defendants to shew cause why they, as also their agents and servants, should not be restrained by an injunction in the use and enjoyment of the subject-matter of the litigation now in their possession.

It appeared that there was no foundation for any suggestion that the defendants were about to commit an act in the nature of waste.

*Mr. B. C. Mitter, Babu Provas Chandra Mitter and Babu Narendra Chandra Bose*, for the petitioners.

*Mr. S. P. Sinha, Dr. Rash Behari Ghose, Babu Ram Charan Mitra and Babu Mohini Mohan Chatterjee*, for the opposite party.

*Cur. adv. vult.*

MOOKERJEE AND CASPERSZ JJ. We are invited in this Rule, by the plaintiff-respondent in an appeal from original decree to grant an injunction upon the defendants-appellants so as to restrain them in the use and enjoyment of the subject-matter of the litigation now in their possession. The circumstances under which the Rule was obtained are not disputed, and may be briefly narrated. The subject-matter of the litigation is known as the Dumraon Raj estate, which was in the possession of Maharani Beni Prasad Koeri up to the time of her death, on or about the 13th December, 1907. Upon her death the Court of Wards took possession of the estate on behalf of an infant Jung Bahadur Singh, now known as Maharaj Kumar Srinibash Prasad Singh, alleged to have been adopted by the late Maharani and entitled to succeed to the Raj as such adopted son. The plaintiff thereupon commenced this litigation in the Court of the Subordinate Judge for recovery of possession of the estate, on the allegation that he was the reversionary heir lawfully entitled to succeed to the properties upon the death of the Maharani. The trial lasted for many months, and on the 12th August, 1910, a decree was made in

favour of the plaintiff. On the 8th September following, the defendants lodged an appeal in this Court, and obtained a Rule for stay of execution as also an order for an *ad-interim* stay of proceedings. On the same date, the plaintiff obtained a Rule upon the members of the Board of Revenue, under section 45 of the Specific Relief Act, to compel them to release the estate in his favour. Both these Rules were discharged on the 2nd March, 1910. The plaintiff thereupon obtained the Rule now under consideration, calling upon the defendants-appellants to shew cause why they, as also their agents and servants, should not be restrained from spending any sums whatsoever out of the estate; he also asked for an *ad-interim* injunction to restrain the defendants from spending any sums except such sums as are necessary for the payment of Government revenue and other public charges and rents due to superior landlords. This prayer, however, was not granted.

In support of the Rule, it has been argued by learned counsel, that the defendants-appellants ought not to be allowed to spend the income of the properties in their possession to which the title of the plaintiff has been declared by the Court of first instance, and that, in any event, the defendants ought not to be allowed to spend any sums in excess of what is needed for the payment of Government revenue and other public charges and rents due to superior landlords as also sums needed for the management of the estate. It has been contended in substance that if the defendants are not so restrained, they may spend the whole of the income of the estate, as it is alleged they have done in the past, and that plainly they have no authority to appropriate to their own use monies which belong to the plaintiff. In answer to the Rule it has been argued, that the question of the title of the plaintiff is still in controversy; that in spite of the decision of the original Court, it cannot be maintained that the plaintiff has any fair prospect of success; that, in any event, the plaintiff has other remedies at his disposal; and that, in any view, the plaintiff cannot by an injunction practically compel the defendants to manage the estate at their cost for his benefit. After careful considera-

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tion of the arguments which have been addressed to us on both sides, we are of opinion that the application for an injunction ought to be refused.

It may be conceded that the plaintiff now occupies a position of some advantage by reason of the decision in his favour by the original Court. If the application for injunction had been made during the pendency of the trial in the Court below, the defendants could undoubtedly have contended that the injunction ought not to be granted until the plaintiff had established, as put by Lord Cottenham in *Clayton v. Attorney General* (1), that he has a fair prospect of success, or, as observed in other cases [*Preston v. Luck* (2), *Challender v. Royle* (3), and *Republic of Peru v. Dreyfus* (4)], that he has made out a probable or *prima facie* case. Let us assume, therefore, that as the plaintiff has made out his title after a protracted trial in the Court of first instance, he has a *prima facie* claim to the disputed properties. But this by itself is not sufficient to justify the grant of an injunction. It is well settled that, as a general rule where the plaintiff is out of possession and claims possession, the Court will refuse to interfere by grant of injunction against the defendant in possession under a claim of right; but where the threatened injury would be irreparable, an injunction will lie at the instance of a complainant out of possession, though in jurisdiction where a distinction is made between a Court of Law and a Court of Equity, such injunction has been refused even against irreparable injury, if the title has not been established at law and no action to establish it has been brought: *Strelley v. Pearson* (5), *Harman v. Jones* (6), and *Wilson v. Townend* (7). In this country, however, we are not embarrassed by the distinction between a Court of Law and a Court of Equity; in any event, in the case before us, the plaintiff has commenced a suit for declaration of his title and has been successful in the original Court.

(1) (1834) 1 Coop. temp. Cott. 97, 139. (4) (1888) 38 Ch. D. 348, 362.

(2) (1884) 27 Ch. D. 497, 505.

(5) (1880) 15 Ch. D. 113.

(6) (1841) 1 Cr. & Ph. 299.

(3) (1887) 36 Ch. D. 425, 436.

(7) (1860) 1 Dr. & Sm. 324.



The principle, therefore, to be applied here is that, unless irreparable injury is threatened, the Court will not grant an injunction to the plaintiff who is out of possession as explained in *Lowndes v. Bettie* (1), where the decisions were reviewed and classified by Kindersley V.C. As the learned Judge pointed out, the remedy by injunction is afforded more liberally to a complainant in possession to protect that possession than to one out of possession to protect the property until possession can be recovered by law.

The same doctrine has been recognised in numerous decisions in the American Courts as based on sound principles of justice, equity and good conscience; and it has been repeatedly ruled that a defendant in possession will not be enjoined from the use of the property in controversy, unless it is made to appear that the complainant will otherwise lose the fruits of his action if he establishes his title. The leading decision upon the point is the case of *Snyder v. Hopkins* (2), where Mr. Justice Brewer laid down the principle that, pending an action for possession, while the title is disputed and still finally undetermined, the defendant ought not to be restrained from continuing in possession and from the ordinary natural use of the premises and the enjoyment of all benefits which flow from such possession. If, however, the defendant should attempt to commit any act in the nature of waste, the Court will interfere by injunction to restrain him. A similar view was affirmed in *Hunt v. Steese* (3), *Williams v. Long* (4) and *Taylor v. Clark* (5): see also *Lloyd v. Trimleston* (6), and *Fingal v. Blake* (7). In the case before us, there is no foundation for any suggestion that the defendants are about to commit an act in the nature of waste; the plaintiff, therefore, is not entitled to an injunction to restrain them in the enjoyment of the properties still in their possession.

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(1) (1864) 33 L. J. Ch. 451;  
10 L. T. 55.

(2) (1884) 31 Kansas 557;  
3 Pac. 367.

(3) (1888) 75 Cal. 620;  
17 Pac. 920.

(4) (1900) 129 Cal. 229;  
61 Pac. 1087.

(5) (1898) 89 Fed. Rep. 7.

(6) (1829) 2 Molloy 81.

(7) (1828) 2 Molloy 50.

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Apart from the reason just stated, it is clear that no injunction ought to be granted in the case before us as the plaintiff has another adequate remedy. It is plain that the plaintiff can execute the decree he has obtained and thereby obtain full and ample relief. It is also obvious that the injury apprehended by the plaintiff is susceptible of perfect pecuniary compensation; in fact, the plaintiff has obtained a decree for mesne-profits during the period of dispossession. No doubt, the mere fact that damages are recoverable is no objection to the grant of an injunction in cases where such damages would not be an adequate compensation for the injury, for instance, where the amount of the damage cannot be accurately computed or where the amount cannot be adequately proved: *Jordeson v. Sutton Gas Company* (1). Here, however, there is no solid ground suggested in support of the view that the plaintiff will not be amply compensated for any injury he may suffer if the injunction is refused. Consequently, as an equally efficacious relief is available to the plaintiff, the Court will not grant an injunction.

Lastly, it may be observed that if an injunction were granted, it must necessarily be of the vaguest description. As already stated, the plaintiff prays that the defendants should be restrained from spending any portion of the income of the estate except for payment of Government revenue and other similar demands or rent payable to the superior landlord. This is manifestly unreasonable, because the plaintiff cannot in justice call upon the defendants to manage the estate for him at their expense. The learned counsel for the plaintiff, therefore, conceded that the injunction if granted should be so framed as to leave it open to the defendants to spend such portion of the income as might be needed for the management of the estate. But any injunction so framed, would obviously lack precision, and consequently, become valueless. If the plaintiff should subsequently apply to this Court to proceed against the defendants for alleged violation of the injunction, and if the defendants should plead that any

(1) [1899] 2 Ch. 217.

disputed sums they had spent were needed for the protection of the estate, the Court could hardly undertake to determine the validity of the objection; the result would be that the injunction, by reason of indefiniteness would be practically useless. Under circumstances like these when the plaintiff really seeks to obtain control over the expenditure of the income of the disputed property during the pendency of the litigation, the appropriate remedy is rather by the appointment of a receiver than by the grant of a vague and indefinite injunction. In our opinion, the objections we have explained are, each of them, fatal to the grant of the injunction.

The result, therefore, is that the Rule is discharged with costs.

S. C. G.

*Rule discharged.*

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## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,  
and Mr. Justice Woodroffe.*

McINERNY

v.

THE SECRETARY OF STATE FOR INDIA. \*

1911  
June 9.

*Cause of action—Amendment of plaint—Secretary of State for India in Council—Action in tort—Notice of suit—Civil Procedure Code (Act V of 1908) s. 80—Amendment of plaint, when not permissible—Leave to withdraw.*

Where notice of an action against the Secretary of State for India in Council required under section 80 of the Civil Procedure Code, pointed to a suit based on negligence, and the original plaint proceeded on that basis, and it was subsequently sought to amend the plaint by setting up a cause of action based on nuisance:—

*Held*, that such amendment of the plaint could not be permitted.

Leave to withdraw suit granted.

APPEAL by the plaintiff, J. F. H. McInerny from the judgment of Fletcher J.

\* Appeal from Original Civil. No. 37 of 1910.

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This appeal arose out of an action in tort brought by J. F. H. McInerny against the Secretary of State for India in Council, claiming the sum of Rs. 40,000 as damages for injuries received.

The original plaint in the suit which was filed on the 6th May, 1909, was as follows:—

"1. On the 24th August, 1908, the plaintiff was injured through falling over a post on the maidan at a place on the western side of the tram-lines nearly opposite Kyd Street in Calcutta.

"2. The said post was the property of the Government.

"3. The said post was placed and maintained by the Government in the position aforesaid.

"4. The maidan is, as the plaintiff is informed and believes, the property of the Government and is vested in the Government for the use and benefit of the public of Calcutta.

"5. The plaintiff was lawfully passing over the maidan as he was entitled to do when he fell over the said post.

"6. The said post was placed on a footpath which forms part of the maidan, where persons are in the habit of lawfully passing and re-passing.

"7. The said post was so placed as to be a wrongful obstruction of the footpath and of the maidan.

"8. The said post was negligently placed and maintained in a dangerous position on the footpath near the tram-lines."

The remaining paragraphs of the plaint set out particulars of the occurrence and the injuries received which were admittedly of a grievous nature, and stated that due notice of action as required by section 80 of the Civil Procedure Code, 1908, was delivered on the 29th January, 1909.

The notice was in these terms:—

"Take notice that at the expiration of two months after the delivery of this notice a suit will be instituted against the Secretary of State for India in Council by Joseph Francis Hehir McInerny, of 9, Pretoria Street, Calcutta, Deputy Chief Accountant in the service of the Port Commissioners for Rs. 40,000 damages for personal injuries sustained through falling over a post on the maidan at or near Kyd Street on 24th August, 1908, which said post was the property of Government and was negligently placed and maintained on a foot-way alongside the tramcars."

In the written statement negligence was denied. It was alleged that the footpath was a public highway, that the post was in all respects properly and safely placed, and that the

accident was induced by the plaintiff endeavouring to enter a tramcar in motion in breach of the rules and regulations of the Calcutta Tramways Company. It was submitted finally that the plaintiff disclosed no cause of action.

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The suit came on for hearing before Fletcher J., on the 16th February, 1910.

*The Advocate-General, Mr. Kenrick, K.C., (Mr. J. E. Bagram, Mr. Knight and Mr. Stokes with him), for the defendant, took the preliminary objection that the suit was not maintainable, as no action would lie against the Secretary of State for India in Council, in tort, and cited Nobin Chunder Dey v. The Secretary of State for India (1); Jehangir M. Cursetji v. Secretary of State (2); Shirabhajan v. Secretary of State for India (3).*

*Mr. McInerny (of the Kurrachi Bar), for the plaintiff, relied on P. & O. S. N. Co. v. Secretary of State for India (4); Forester v. The Secretary of State (5); Shirabhajan v. Secretary of State for India (3); The Secretary of State for India v. Hari Bhanji (6); The Secretary of State for India in Council v. Kamachee Boye Sahaba (7).*

Fletcher J., upheld the objection in demurrer and dismissed the suit observing as follows:—

“This is a suit brought by the plaintiff against the Secretary of State claiming damages for negligence in respect of an accident which happened to him on the public highway.

The first point to be decided is whether the plaintiff discloses any cause of action. Now, the allegations made in the plaintiff are as follows. On the 24th August, 1908, the plaintiff says, he was injured by falling over a post which, in the plaintiff, is stated to be placed on the maidan (now counsel for the plaintiff says it was on the public highway) on the western side of the Chowringhee Road. The plaintiff then alleges that the post is the property of Government and is maintained and kept in position by Government. These are the material allegations, except one that relates to the ownership of the maidan, which the plaintiff says is the property of Government and subject to the

(1) (1875) I. L. R. 1 Calc. 11.

(4) (1861) 5 Bom. H. C. R. Appx. 1

(2) (1902) I. L. R. 27 Bom. 189.

(5) (1872) 12 B. L. R. 120.

(3) (1904) I. L. R. 28 Bom. 314.

(6) (1882) I. L. R. 5 Mad. 273, 279.

(7) (1859) 7 Moo. I. A. 476.



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trusts for the benefit of the public of Calcutta. In paragraphs 9, 10 and 11 the plaintiff sets forth particulars of the unfortunate accident which happened to the plaintiff on the evening of the 28th August, and it is admitted that his hand was very seriously injured by a tramcar.

Now, there is one proposition of law that cannot be doubted, and that is that no suit can lie against the Crown unless that right is given by statute. It requires no authority to support that. In this case the plaintiff has got to show that the statutes have given him a right against the Secretary of State in Council as representing the Crown. The first statute that is material is the statute of 3 and 4 William IV, Chapter 85, section 9. That was the statute which put an end to the commercial undertaking and general trading business of the East India Company and continued the Charter for a short time. Section 9 enacts that "from and after the said twenty-second day of April one thousand eight hundred and thirty-four all the Bond debt of the said Company in Great Britain, and all the Territorial debt of the said Company in India, and all other debts which shall on that day be owing by the said Company, and all sums of money, costs, charges and expenses which, after the said twenty-second day of April, one thousand eight hundred and thirty-four, may become payable by the said Company in respect or by reason of any covenants, contracts or liabilities then existing, and all debts, expenses and liabilities whatever which, after the same day, shall be lawfully contracted and incurred on account of the Government of the said territories, and all payments by this Act directed to be made, shall be charged and chargeable upon the revenues of the said territories."

Then comes the "Act for the Better Government of India," 21 and 22 Vict., Chapter 106. Section 65 enacts: "That the Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all Persons and Bodies Politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company."

Now, if these two sections stood alone, I should have shared the doubts expressed by the present Chief Justice, when he was the Chief Justice of Bombay, in the case of *Shivabhai v. Secretary of State for India* (1). I should have thought that the word "lawfully" governed not only the word "contracted" in section 65, but also the words "liabilities incurred." That I should have thought so was because the liabilities to which the East India Company were liable after the passing of the Act of 1883, were liabili-



ties which should have been incurred on account of the Government of the said territories. There is, however, a decision of this Court in the case of *P. & O. S. N. Co. v. Secretary of State for India* (1), in which it is expressly laid down that the suits which may be brought against the Secretary of State in this Court are not limited to the suits which may be brought against the Crown, but beyond that I do not think that this case is an authority for the wide proposition that the learned counsel for the plaintiff has tried to establish. The other case in this Court is the case of *Nobin Chunder Dey v. The Secretary of State for India* (2), which is a decision of Chief Justice Garth and Mr. Justice Macpherson on appeal from the Original Side, and laid down expressly what is the nature of the liability of the Secretary of State under s. 65 of the Act of 1858, and the head-note expresses precisely what was the result of that judgment, that suits such as might, previously to the passing of the Statute 21 and 22 Vict., Chapter 106, have been brought against the East India Company are limited to suits for acts done in the conduct of undertakings which might be carried on by private individuals. That case is binding upon me. The case of *The Secretary of State for India v. Hari Bhanji* (3) is not a decision of this Court. The case of *Nobin Chunder Dey v. The Secretary of State for India* (2) is binding upon the Judges of the Original Side. That being so, the only point one has to consider in this case is, is this a suit brought as stated in the decision of Chief Justice Garth and Mr. Justice Macpherson in *Nobin Chunder Dey v. The Secretary of State for India* (2)? In my opinion, obviously it is not. This case is a case to make the Government liable to pay compensation out of Government revenues. What for? For an act which happened to the plaintiff on the public highway? What commercial undertaking or other trading operation were the Government of India carrying on in maintaining the public path on the public highway? It is clear that it does not appear that this case comes within the decision of *Nobin Chunder Dey v. The Secretary of State for India* (2), and the plaint discloses no cause of action.

Learned counsel for the plaintiff has asked leave to amend the plaint. If there was any real *bona fide* intention to amend the plaint, so that the unfortunate plaintiff might recover compensation for the injuries he has suffered, I should have immediately granted it. I am satisfied, however, on the statement of the plaintiff, that this plaint cannot be amended so as to show any cause of action against the defendant. That being so, there remains nothing for me but to dismiss the suit. The general costs of the suit must go to the Government. The costs will be taxed on scale No. 2."

From this judgment the plaintiff appealed.

*Mr. B. Chakravarti* (*Mr. J. Chatterjee* with him) for the appellant, contended that the action was maintainable against

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(1) (1861) 5 Bom. H. C. R. Appx. 1. (2) (1875) I. L. R. 1 Calc. 11.

(3) (1882) I. L. R. 5 Mad. 273.

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the Secretary of State for India in Council: *The Secretary of State for India v. Hari Bhanji* (1); *P. & O. S. N. Co. v. Secretary of State for India* (2); *Shivabhajan v. Secretary of State for India* (3); *Salaman v. Secretary of State for India* (4); *Dhackjee Dadajee v. The East India Company* (5); *The Corporation of the Town of Calcutta v. Anderson* (6); *Kishen Chand v. The Secretary of State for India in Council* (7).

[WOODROFFE J. referred to *Rogers v. Rajendro Dutt* (8).]

On the first day of the hearing of the appeal, the 15th May, 1911, it was admitted by counsel for the appellant that plaintiff needed amendment inasmuch as the allegations contained in the plaint could not be supported by evidence. An adjournment was granted by the Court of Appeal for the purpose of amending the plaint. Two further adjournments were granted for further amendments of the plaint on the 23rd and 25th May.

On the 8th June, the following amended plaint was sought to be placed before the Court:—

"1. On the 24th August, 1908, at about 9-15 P.M., on a dark night while the plaintiff was lawfully passing over a footpath which is a part of the Chowringhee Road being a public highway and belonging to the Corporation of Calcutta, which footpath adjoins the maidan at a place on the western side of the tram-lines nearly opposite Kyd Street in Calcutta, he (the plaintiff) was injured through falling over a post on the said footpath.

"2. The said post was wrongfully placed and left standing on the said footpath by the servants and agents of the Government in the position aforesaid in connection with the supervision of the said maidan such servants and agents purporting to act within the scope of their authority in that behalf.

"3. The said maidan was as the plaintiff is informed and believes the property of the Honourable the East India Company and subsequently became vested in the Crown and the Government lets out portions of the same from time to time in the same way as a private owner would do and thereby realises an income therefrom.

"4. The said post was so placed and so left standing by the said servants and agents as to be a wrongful obstruction of the said footpath and a source of danger to persons passing and repassing on the said footpath and the said maidan and the injuries caused to the

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| (1) (1882) I. L. R. 5 Mad. 273.  | (5) (1843) 2 Mor. Dig. 307.         |
| (2) (1861) 5 Bom. H. C. Appx. 1. | (6) (1884) I.L.R. 10 Cal. 445, 478. |
| (3) (1904) I. L. R. 28 Bom. 314. | (7) (1881) I. L. R. 3 All. 829.     |
| (4) [1906] I. K. B. 613.         | (8) (1860) 8 Moo. I. A. 103.        |

plaintiff were due to the wrongful obstruction aforesaid of the said footpath which was and is a public highway."

The remaining paragraphs dealt with the occurrence and the nature of the injuries suffered and stated that notice of action as required by section 80 of the Civil Procedure Code had been duly delivered.

*The Advocate-General, Mr. Kenrick, K.C., (Mr. B. C. Mitter, Standing Counsel, with him), for the respondent, took the objection that whereas the notice of action pointed to a suit grounded on negligence, the proposed amended plaint was based on nuisance; the cause of action was therefore essentially altered, and the amendment should not be allowed.*

*Mr. Chatterjee, for the appellant, asked for leave to withdraw the present suit with liberty to institute a fresh one.*

JENKINS C.J. This case comes before us by way of appeal from a decree of Mr. Justice Fletcher who dismissed the plaintiff's suit.

On the case being placed before us it was perceived that apart from the difficulty that there might be in bringing a suit against the Secretary of State for India in Council for a tort, alleged to have been committed by an agent of the Government, there was a further obstacle in the plaintiff's way that the facts as alleged in his plaint could not be supported by evidence, inasmuch as it had been discovered and was the case that the obstacle in respect of which the plaintiff claimed, was not, as the plaint alleged, on the land of the Crown, in other words, on a part of the maidan but on a part of the highway which was adjacent to the maidan. Therefore, leave was sought from us to amend the plaint so as to bring it into conformity with the facts which the plaintiff believed he could prove, and we required as a condition of this application that the proposed plaint should be drafted and placed before us. That has now been done. The plaint as now proposed by way of amendment differs in an essential degree from the original plaint. The original plaint proceeded upon *negligence*, whereas the new plaint proceeds upon *nuisance* in the form of obstruction on the highway, so that

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it is impossible to say that the cause of action is the same. This brings in the plaintiff's way the difficulty created by section 80 of the Code which prescribes that "no suit shall be instituted against the Secretary of State for India in Council. . . . until the expiration of two months next after notice in writing has been delivered to or left at the office of a Secretary to the Local Government or the Collector of the district. . . . stating the cause of action, the name, description and place of resident of the plaintiff and the relief which he claims." The notice which was served as a preliminary to the plaint as originally framed pointed to a suit based on *negligence* and it stated a cause of action different from that on which the plaintiff would rely in his proposed plaint. It follows, therefore, that it is not open to us to give the plaintiff permission to amend his plaint.

In these circumstances Mr. Chatterjee on behalf of the plaintiff has asked for leave to withdraw the suit under order XXIII, rule 1 of the Code of Civil Procedure, and he desires that he should have permission to withdraw from the suit with liberty to institute a fresh suit in respect of the subject-matter of this suit.

The defendants give no opposition to this application, though they do not encourage it, and their attitude is no doubt referable to the terms of rule 2 of order XXIII of the Code. What the effect of that rule may be on the proposed new suit, it will be out of place for me now to discuss. But in the circumstances, we give the plaintiff permission to withdraw the present suit with liberty to institute a fresh suit in respect of the subject-matter of this suit.

We do not interfere with the decision of Mr. Justice Fletcher as to costs, which will stand, and the plaintiff-appellant will pay the costs of this appeal.

WOODROFFE J. concurred.

Attorneys for the appellant: *Pugh & Co.*

Attorney for the respondent: *Kesteven.*

## PRIVY COUNCIL.

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P.C.\*  
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[On appeal from the Chief Court of Lower Burma, at Rangoon.]

*Specific performance—Denial of execution of agreement by defendant—Conflicting evidence as to genuineness of signature—Consideration as to which story best agrees with admitted facts—Defendant in pecuniary difficulties—Plaintiff in a position to “dominate his will”—Bargain onerous but not unconscionable—Absence of fraud or misrepresentation by plaintiff—Discretion in granting or refusing specific performance.*

In a suit to enforce specific performance of an agreement dated 4th April, 1906, for the sale of land, in which the defendant (appellant) denied that he ever signed the agreement, the evidence on that point was conflicting, though otherwise there was much unanimity on the general facts. The two lower Courts (of the Chief Court of Lower Burma) differed, the Original Court holding that the defendant's signature was a forgery, and the Appellate Court reversing that decision and making a decree for specific performance.

*Held*, by the Judicial Committee, that the proper course was to examine the admitted facts and circumstances as furnishing the safest guide to a correct conclusion. On this test their Lordships were of opinion that the plaintiff's (respondent's) account of the transaction best fitted in with the admitted facts and that the defence was untrue.

The defendant, when he acquired the land in 1901, was admittedly in pecuniary difficulties, and had bought it with money raised by mortgaging it. In 1905 his mortgagee was pressing for payment, and another creditor had taken out execution. The arrangement he was obliged to make with the plaintiff was, therefore, necessarily of a somewhat onerous nature.

*Held*, that in the absence of any evidence of fraud or misrepresentation on the part of the plaintiff, which induced the defendant to enter into the contract, or that the plaintiff under the circumstances took an improper advantage of his position or the difficulties of the defendant, and having regard to the character of the agreement, which, in their opinion, though onerous, was not unconscionable, their Lord-

\* *Present*: LORD ATKINSON, LORD ROBSON, SIR ARTHUR WILSON AND MR. AMEER ALI.

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ships saw no reason, in the exercise of their discretion, for refusing to grant specific performance. The decree of the Appellate Court was therefore upheld.

APPEAL from a decree (11th May, 1909) of the Chief Court of Lower Burma in its appellate jurisdiction, which reversed decree (18th February, 1908) of the same Court in its Original Civil Jurisdiction.

The defendant was the appellant to His Majesty in Council.

The principal question for decision on this appeal was whether the signature of a letter dated 4th April, 1906, and purporting to be signed by the appellant was a forgery. The respondent (plaintiff) contended that this letter was signed by the appellant, and constituted a valid agreement for the sale by him to the respondent of the equity of redemption in certain property which had been mortgaged by the appellant to the respondent.

The suit out of which the appeal arose was one for specific performance of an agreement for the sale of land of which the defendant was owner, consisting of about 19,000 acres in the Pegu District, known as the Zainganaing grant, and of a plank house in Rangoon. This property had been mortgaged by the defendant to one Dr. Dey and others. The defendant being desirous of raising money, to pay off these mortgages, borrowed from the plaintiff, on 30th September, 1905, Rs. 50,000 upon a mortgage of the above house and land. It was arranged that the money should be raised by hundis drawn by the defendant and one Ba Pe in favour of the plaintiff, and endorsed over by the latter to the Bank of Bengal. By the terms of the mortgage the principal was to be repaid in three months, and the defendant was to pay the Bank interest on the hundis, and also interest to the plaintiff for the accommodation at 6 per cent. per annum.

This arrangement was carried out and the Rs. 50,000 was raised upon five hundis (Exhibit C) dated 30th September, which fell due on 2nd January, 1906. When these hundis fell due, they were renewed upon the same terms. The



plaintiff took from the defendant a promissory note (Exhibit E) for the next three months' interest, and a fresh set of hundis (Exhibit D) was executed, which became due on 4th April, 1906. The plaintiff's case was stated in paragraph 6 of the plaint as follows:—

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"That when the second set of hundis were about to fall due the defendant again informed the plaintiff that he would be unable to meet them, and asked the plaintiff to continue the loan for three months more. That the defendant had not then nor has he ever paid any of the interest due on the loan. That the plaintiff told the defendant that he could not go on renewing the hundis indefinitely without being paid his interest, and that if the defendant could not pay up the interest within the next three months, he had better set a price on the mortgaged property, and let plaintiff have it for that price in satisfaction of his debt, the plaintiff paying the balance after deducting his principal and interest. That the defendant agreed to this and the price at which the property was to be sold in the event of defendant's failing to pay the interest was agreed by the plaintiff and defendant at one lakh of rupees. That the plaintiff not being willing to take the defendant's word required the defendant to put his promise into writing, and the defendant accordingly, on the 4th April, 1906, signed a letter addressed to the plaintiff embodying his promise. The said letter is filed herewith, and the plaintiff craves that it may be taken as a part of this plant."

The plaint further stated that the hundis were thereupon again renewed on 6th April, 1906, a third set (Exhibit I) being drawn, that the defendant failed to pay the interest on those by the due date, 6th July, 1906, and that he had refused to carry out his agreement to sell. The plaintiff accordingly claimed specific performance, or in the alternative one lakh of rupees as damages.

The defendant admitted the mortgage and his failure to pay interest. He denied that he agreed to sell for one lakh, and that he signed the letter of 4th April, 1906 (Exhibit H). He stated that he was asked to sign a letter and also an agreement to the same effect, but that he refused, and wrote to the plaintiff asking him to wait for six months, and undertaking, in the event of his failing to pay all interest within that time, to sell the land to him for such price as might then be offered. The defendant pleaded that the Court had no jurisdiction; and also that even if the letter (Exhibit H) he held to

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be genuine, it could not be specifically enforced, as it was an oppressive fetter upon his equity of redemption.

Of the issues settled, the only one now material is Issue No. 2 "Did defendant enter into the agreement set out in paragraph 6 of the plaint, and did he sign the letter of 4th April, 1906 (Exhibit H)?"

On this issue the original Court (MOORE, J.) after discussing the evidence at some length, concluded thus:—

"After the most anxious consideration however I am unable to hold that the agreement set up has been proved. The evidence of Nya Bwa and of Ba Pe was far from satisfactory. Shwe Goh himself was obviously not a perfectly candid witness. His story in Court differed materially from the story set forth in the plaint and his evidence and that of Nya Bwa not merely does not account for the document (Exhibit 1), but seems to me to be inconsistent with the existence of that document. Upon the second issue, therefore, I hold that it is not proved that Davis agreed to sell his land to Shwe Goh as alleged, and I therefore dismiss this suit, with costs."

On appeal by the plaintiff the case came before C. E. Fox, Chief Judge, and L. M. PARLETT, J., who said in a judgment delivered by the former:—

"Taking all the circumstances into consideration, I do not think that it is at all improbable that the defendant should have signed the letter (Exhibit H).

"His case is that he never even saw the letter until he saw it in Court. According to him nothing beyond the incidents connected with Exhibits 1 and 2 happened on the 4th April, but on the 5th or 6th Nya Bwa brought renewal bills for signature by him, and, after he had signed them, Nya Bwa produced a stamped document written in type. He read this: its terms were something like those of Exhibit H. His wife, his adopted daughter Ma Mi, and Ma E Byu were, he says, the only persons present at the time besides Nya Bwa and himself. The perusal of the terms of the document brought on him a fit of rage, and there ensued a dramatic scene worthy to be produced in a melodrama. The upshot was that he indignantly refused to sign the document and Nya Bwa took it away. Nothing more occurred until he received the plaintiff's letter on the 16th June, Exhibit K, which he took to refer to his own letter, the draft of which is Exhibit 2.

"To believe this story one must believe that the plaintiff, who, it is clear, was unwilling to renew the bills, unless he got some advantage for doing so, put his signature on the back of the fresh bills without having obtained the defendant's signature to a document which he had prepared and had sent with the fresh bills for signature, and that he signed the bills without a word of explanation from the defendant as to his refusal to sign the document. If the defendant's story as to

what happened on his being asked to sign the document is true, the indignant refusal to sign the document must have been communicated to the plaintiff by Nya Bwa, yet on that very day or the next day the plaintiff must have renewed the bills without getting what he had required before he would renew them, and he must have determined to get by a forged document what he was unable to get by a genuine document. In the first place it is almost incredible that any man could have so acted, and that a man of the plaintiff's means and position should have so acted is virtually beyond the range of possibility. Moreover, Nya Bwa would have to be induced to say that the defendant had signed the document in face of his knowledge that there might be four persons who would say that the defendant had indignantly refused to sign such a document. If the signature to Exhibit H is a forgery, it is the boldest forgery I have heard of. The defence story as to the refusal to sign the document appears to me unreal on the face of it. The proposition that the defendant should sell the lands to the plaintiff for a lakh of rupees if he failed to pay the interest due within three months was admittedly put before the defendant on the day previous or two days previous to the alleged stamped paper being put before him for signature. One would have thought that if such a proposition could rouse the defendant to extreme anger, the first occasion would have been the one for his outburst, but the only thing certain as to what happened then is that the defendant altered the proposed time of three months to twelve months, and that he left his proposed agreement to sell for a lakh of rupees as it stood. On the whole I think the improbabilities of the signature on Exhibit H being a forgery are far greater than the improbabilities of the defendant having signed the document, and I cannot entertain any doubt that he did in fact sign it.

"No question has been argued as to his being bound by the agreement it contains, or as to the plaintiff's right to enforce such agreement if the defendant did sign the letter.

"I would therefore allow the appeal and setting aside the decree of the original Court would give the plaintiff a decree ordering the defendant to specifically perform his agreement contained in the letter (Exhibit H), that is to say, to sell and convey to the plaintiff for one lakh of rupees the lands and property set out in the schedule to the Mortgage Deed of the 30th of September, 1905—Exhibit B in the case. I would also order the defendant to pay the plaintiff's costs of the suit and of this appeal.

The decision of the first Court was accordingly reversed and decree given for the plaintiff.

On this appeal,

*DeGruyther, K. C.*, and *E. U. Eddis*, for the appellant, contended that the alleged agreement of the 4th April, 1906, was, as held by the Original Court, not proved; that the

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weight of evidence as well as the probabilities of the case were in favour of the appellant, and that, owing to the circumstances of the case, the respondent, his creditor, was in a position to "dominate the will of" the appellant within the meaning of section 16 of the Contract Act (IX of 1872) as amended by Act VI of 1899. Reference was made to *Dhanipal Das v. Maneshar Baksh Singh* (1). It was submitted that with regard to the onerous and unconscionable nature of the bargain which the respondent was seeking to enforce, their Lordships should in the exercise of their discretion not grant a decree for specific performance. Reference was made to the Specific Relief Act (I of 1877), section 2, sub-sections 1 and 2. In any case the agreement, if proved, was bad as being a clog on the equity of redemption.

*Clement M. Bailhache, K.C.*, and *W. Arnold Jolly*, for the respondent, contended that the finding of the Original Court that the letter of April 4th, 1906, was a forgery was against the weight of evidence and the probabilities of the case; that that Court was wrong also in discrediting the evidence of Nya Bwa and Ba Pe on the ground of the discrepancies between the accounts given by them of the transaction after a lapse of two years; that the story told by the appellant and his witnesses, Ma Mi and Ma E Bya, bore traces of being a concocted story, and was on the face of it utterly improbable; that the oral evidence being conflicting and unsatisfactory, their Lordships ought to be guided by the admitted circumstances, the documentary evidence, and the probabilities of the case, all of which supported the contention of the respondent. The agreement, it was submitted, of 4th April, 1906, was fair and reasonable, and the rule as to clogging the equity of redemption had no application to the present case. Reference was made to the Specific Relief Act, section 22, and *Knight v. Marjoribanks* (2). The decision of the Chief Court on appeal should be upheld.

*DeGruyther, K. C.*, replied.

(1) (1906) I. L. R. 28 All. 570; (2) (1849) 2 Mac. & Gor. 10, 13, 14. L. R. 33 I. A. 118.

June 14.

The judgment of their Lordships was delivered by

MR. AMEER ALI. This appeal arises out of an action brought by the plaintiff-respondent in the Chief Court of Lower Burma in the exercise of its original civil jurisdiction to enforce the specific performance of an agreement alleged to have been executed by the defendant-appellant on the 4th of April, 1906, and in the alternative for damages.

The First Court dismissed the suit, "being unable to hold that the agreement set up had been proved." The Chief Court on appeal has arrived at a totally different conclusion; it has found that the document was signed by the defendant, and it has accordingly reversed the decision of the First Court, and decreed the plaintiff's claim. The defendant has appealed to His Majesty in Council, and the only question for determination relates to the genuineness of his signature on the agreement in suit.

Although the parties are at issue on this, the vital point in the case, there is otherwise singular unanimity on the general facts. In the conflict of opinion between the Courts in Burma it seems necessary to their Lordships to examine the admitted facts and circumstances as furnishing the safest guide to a correct conclusion.

When the defendant in 1901 acquired the land regarding which he is said to have executed the agreement, he was, on his own admission, in pecuniary difficulties. He had bought the land, which was mostly waste and undeveloped, with money borrowed on its mortgage. In 1905 he was undoubtedly in difficulties; one creditor appears to have taken out execution, the principal mortgagee was pressing for repayment, and, although, according to his statement even at that time, he had received good offers for the property, they had all fallen through, as each time he had increased his price. It was in these circumstances that he applied to the plaintiff for accommodation. The arrangement entered into, as one of the learned Judges in the Chief Court observes, was onerous even for Burma. The defendant was to obtain Rs. 50,000 from the Bank of Bengal on the credit of the plaintiff; he was to draw,

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in conjunction with a Burmese broker Ba Pe or Hpay, who appears only to have lent his name for a small consideration, five bills for Rs. 10,000 each, payable at three months after date in favour of the plaintiff, who was to endorse them over to the Bank of Bengal, to enable the defendant to get them discounted by the Bank. For this accommodation he was to pay the plaintiff interest at the rate of 6 per cent. on the amount of the bills.

This arrangement was duly carried into effect on the 30th September, 1905; the defendant drew five bills and received from the Bank Rs. 50,000 less its charge for discounting. On the same date he executed in favour of the plaintiff, as security for the money he had received, a mortgage on the land binding himself to repay the amount in three months.

The bills fell due on the 2nd of January, 1906. Admittedly the defendant was not in a position to meet them, nor to pay the interest for which he had made himself liable to the plaintiff. He was still unable or unwilling to sell the land which, so far as can be judged from the record, was his only asset. Under the circumstances there appears to have been no alternative left for him but to obtain from the plaintiff a renewal of the bills. The plaintiff assenting, the bills were accordingly renewed for another three months on the same terms as before. As the plaintiff had to meet the interest charged by the Bank on the renewed notes, the defendant executed in his favour a promissory note (Exhibit E) for the interest due to him and the interest which he paid or for which he made himself liable to the Bank of Bengal. These bills were drawn on the 3rd of January and were due on the 6th of April following. It is abundantly clear on the evidence that before the due date arrived the plaintiff began pressing for settlement. His own evidence is distinct on the point and is substantially corroborated by the defendant's witnesses.

Ma Mi, a Burmese lady, who is stated to be the adopted daughter of the defendant, and her friend Ma E Byu, a female broker, both say in substance that they, on several occasions, went to the plaintiff when he told them the interest on the bills



was mounting up, and that the defendant should be advised to pay up within the three months or let him "have the land for a lakh."

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The letter of the 14th February, 1906 (Exhibit F), was a request to the defendant to call at the plaintiff's office "on receipt," as he wished to see him urgently. The plaintiff states, and it is not denied, that it was with regard to payment. Exhibit G, which bears date the 3rd March, is a peremptory demand for payment by the 5th of March of the promissory note (Exhibit E), in default of which legal proceedings were threatened. Although there is no definite statement as to what actually took place between the 3rd and 30th March, there can be little doubt upon the general evidence that during this interval whilst the plaintiff was pressing for his money the defendant was equally anxious for time.

The defendant has produced two letters dated the 31st and 30th March, respectively (Exhibits 3 and 4). Exhibit 4 is addressed by him to the plaintiff and is in these terms:—

"I write to ask you if you are willing to keep the Rs. 50,000 on my property the Zainganaing grant for six months longer if I pay you all money due on receipt and the interests on the Rs. 50,000 every three months in advance. Please let me know by letter without delay."

Exhibit 3 purports to be a reply to Exhibit 4 written by Ba Pe as follows:—

"As you requested I agree to wait for the principal of Rs. 50,000, provided if you will pay up all the due interest, say about three months. Please let me know as soon as possible."

How Exhibit 4 came to be produced by the defendant is not clear. The plaintiff does not appear to have been asked about these two letters, but their Lordships have little doubt on the evidence of Ba Pe or Hpay that the defendant did in fact write Exhibit 4, and received the reply, Exhibit 3, written by Ba Pe probably with the knowledge or acquiescence of the plaintiff. Admittedly, however, nothing was done to carry out the arrangement suggested by the defendant in Exhibit 4.

The material divergence between the parties begins at this stage. The plaintiff says he was not willing to renew

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the bills, unless the defendant agreed that on failure to meet them a third time the property should be conveyed to him for a lakh of rupees, that he accordingly sent the broker with Exhibit H for the defendant to sign, that it was brought back to him with the defendant's signature, and that thereupon he renewed the bills taking a promissory note (Exhibit J), as before, for the interest due to himself and to the Bank. His evidence regarding the instructions to the broker is very clear. He says:—

"Finally I sent a letter by the broker for signature by Davis on the terms that I would not renew the hundis unless he signed the letter. This is the letter which I sent, Exhibit H. I accepted the proposal in that letter."

("I" evidently is a misprint for "he.") Then the plaintiff goes on:—

"I would not have renewed the hundis on any other terms. After Davis had signed I renewed the hundis. These are the fresh hundis then given. . . The second set were returned to me after I endorsed the third. I had to pay interest on the third lot, and I got from Davis this pro-note for interest (Exhibit J.) as he could not pay me in cash. Nya Bwa and his daughter told me he could not pay cash."

In cross-examination he added:—

"I told Nya Bwa that. I told him to tell Davis that I would only renew the hundis if the agreement was made for a lakh. I sent the letter, Exhibit H., with Nya Bwa. I may have sent him to speak about it before that, on an earlier day. I think I may. When I sent him to talk about renewal of hundis I sent him with Exhibit H. I sent Nya Bwa to tell Davis that I would not renew the hundis unless he did sign. I only sent Nya Bwa once that day, the time I sent him with the letter. He brought back the letter with Mr. Davis' signature as it is now."

With regard to the instructions given to him by the plaintiff, the broker, Nya Bwa, states as follows:—

"Shwe Goh gave me this letter in his office and said: 'If the letter is not signed the hundis will not be signed.' I took this letter and the hundis. I took the letter to Mr. Davis at his house in Sule Pagoda Road. I went with Ko Ba Pe who also signed the hundis. He is a broker. I found Mr. Davis in his house. I went inside and upstairs. His daughter Ma Mi was also present. I showed Mr. Davis the letter (Exhibit H). I told him 'If this is not signed, hundis will not be signed.' We were all sitting round a round table. Mr. Davis then signed the letter in my presence."

He says further that after the defendant signed the document, he put his signature on it as witness. Whether the defendant's signature be genuine or not, the cross-examination of this witness shows clearly that there was considerable discussion and a good deal of going to and fro before the plaintiff renewed the bills. Nya Bwa says:—

"The first time I went and spoke about hundis—about signing hundis. Davis asked me to go to Shwe Goh and get him to sign them. He refused, and I went back and told Davis. I went back and told Davis, and said: 'You ought to repay.' Then I went and called Ba Pe to speak to Shwe Goh to sign the hundis. I took Ba Pe to Shwe Goh. It was not on this occasion that the letter was written. I and Ba Pe had to go to Davis again. Before we went Ba Pe tried to persuade Shwe Goh to sign. Shwe Goh refused. So we, Ba Pe and I, went back to Davis and told him that Shwe Goh would not sign. Davis said, 'What is to be done? I have no money.' I went back to Shwe Goh and this letter, Exhibit H, was found (*sic*). Shwe Goh brought it upstairs ready typed."

Maung Ba Pe or Hpay, who had joined the defendant in drawing the bills, and whose name appears on the renewed bills also, states that he had accompanied Nya Bwa when he went to Davis with Exhibit H and the "Hundis." The defendant and his adopted daughter, Ma Mi, deny Ba Pe's presence on the occasion the bills were brought. Their Lordships think that Ba Pe's statement as to his having gone with Nya Bwa is more likely to be true than the denial of Ma Mi or of the defendant, for it must be observed that, although the defendant does say that Ba Pe did not sign the hundis at the same time as he did, and that he believed he signed them afterwards, he does not say, so far as their Lordships can see, that he did so at any other place than his (the defendant's) house.

With reference to the alleged execution of Exhibit H, Ba Pe says as follows:—

"There was first some conversation: it went on some time before he signed. Davis agreed and signed because he thought that during the three months he would be able to raise money on the mortgage. He said so, and I told him that money could be obtained. He did not ask me to borrow money for him, but after that I often met him, and we used to discuss whether he had got the loan or not."

The defendant, on the other hand, stoutly denies the signature on Exhibit H to be his. The defendant's story of

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the circumstances leading up to the renewal of the bills must be given in his own words. He says:—

“Early in April Nya Bwa came to me and said they wanted the hundis paid up and I said I was short of money. Nya Bwa produced this letter, Exhibit 1. I can’t be certain if it was written there or not. I said ‘If you sign this it will be all right.’ I first altered ‘three’ and wrote ‘twelve.’ Then reading on I came to one lakh and said ‘No, I won’t sign anything like this. I will write another,’ and gave Exhibit 1 back to him. It was eventually left in my copy book. Then I wrote out Exhibit 2. I made a fair copy of it and gave it to Nya Bwa in a cover to take to Shwe Goh.”

With regard to Exhibit 1, Nya Bwa says it is in his writing; that he wrote it in Davis’s house on the 4th April, but he could not tell at what interview it was written. Exhibit 1 is in these terms:—

“Rangoon, 4th April 1906.

“My dear Ko Nyab Bwah, If I not succeed within <sup>twelve</sup><sub>three</sub> months I agree to sell my Zainganine land to Shwe Goh (for) a lakh of Rupees. Try and settle upon Shwe Goh as his promise to advance more money if I require.—Yours,”

There can be little doubt that Exhibit 1, as drafted by Nya Bwa, represented what the plaintiff wanted. The defendant says that it was left behind in his copy book when the broker took away the fair copy of Exhibit 2 to give to the plaintiff.

Exhibit 2 is in these terms:—

“Dear Sir, As I am not prepared to pay you the interest, &c., due, beg that you will wait six months from this date. I will then pay you the interest, and the two small bills I owe you. Should I fail to pay you then the interest, I will agree to sell you the land at Pegu for whatever then is offered if you wish to purchase. I am offered now Rs. 2,20,000 and Rs. 2,40,000, but will not sell. My price is Rs. 3,00,000.—G.”

The plaintiff swore he never received the letter, the copy of which (Exhibit 2) was read to him. Nya Bwa’s recollection about this document is hazy, and his statement certainly is not satisfactory. Speaking of Exhibit 1 he says:—

“Exhibit 1 is not signed. I don’t think Davis refused to sign. I think I asked him to sign it. He must have signed this Exhibit 1. I had forgotten all about it till I saw it. Davis did not refuse to sign Exhibit 1. He may have signed a fair copy. If I see it I can say if a fair copy was written. I can say that a fair copy of Exhibit 1 was made, but I cannot say who wrote it, whether I or Davis or Ba Pe. I

can't say what became of the fair copy. It will have been signed; I am not sure. I don't know if this letter, Exhibit 2, was written then or not. I cannot say, and do not remember, if a fair copy of Exhibit 2 was given to me to take away."

The defendant's case is that the bills were renewed on the basis of the arrangement proposed by him on the 4th of April by Exhibit 2, and that his signature on Exhibit II is a forgery.

In dealing with a case of this kind in which the parties are at issue on a vital question of fact, the safe principle is to consider which story fits in with the admitted circumstances. Now the defendant and his witnesses state that the next day, or the day after, he sent the fair copy of Exhibit 2 to the plaintiff by Nya Bwa; the same Nya Bwa brought to him a document which he was asked to sign. "Its terms," he says, "were something like those in Exhibit H; it was an agreement to sell for a lakh." In cross-examination he adds the document offered to him for signature was not Exhibit H; "that had an eight-anna stamp, but was similar to Exhibit H in terms, and in the form of a letter; I think a little different in the heading; it was, I think, 'from Shwe Goh, Dear Sir.' "

And again:—

"I threw the document down in disgust on the table, and went to the back. Then I came back and Nya Bwa read out the document in Burmese. Then he took it away."

Their Lordships will reserve till later their remarks on the statement that the paper shown to him was stamped. But it does seem difficult to conceive why or how a document, which was "something like" Exhibit H in its terms, was brought to the defendant for execution by the same broker who had taken away his proposal contained in Exhibit 2, and on the basis of which it was understood the further transaction was to take place, or how it came to be presented to him without any introductory remark in the calm manner described by him.

The defendant's story is that on reading that paper so presented to him he became very angry, used strong language,

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refused to sign it, and went to the back of the house. He was called back, and when asked by his witness, the female broker Ma E Byu, as to the cause of his anger, he made the following statement:—

"You don't know what is written. If I sign that and I die to-night my children would be beggars—would be robbed. Or if Shwe Goh dies the same result. If Shwe Goh cannot trust me I cannot trust him. I sent him a letter last night asking for six months. If he will not wait go to Court and I will get six or twelve months."

Ma E Byu tells the story of what took place on that occasion in a slightly different form, but she introduces into it a statement made by Nya Bwa to the defendant when he refused to sign the paper, which is of importance. She says that when Davis read the paper he became angry, banged about, and spoke about his throat being cut; he then said "let him" (meaning, presumably, the plaintiff), "accept what I offered yesterday if he likes; I am not a child, I won't do like that." "After that," continues the witness, "Nya Bwa said: 'it is for three months which is a long time; you will be able to make other arrangements; we will see that you are not cheated.'"

Ma E Byu goes on to say that the defendant, after he was called back, persisted in his refusal to sign the paper, and eventually Nya Bwa took it, folded it up, and put it in his pocket.

The suggestion is that, although up to that time the plaintiff had clearly and admittedly not accepted the defendant's "offer" contained in Exhibit 2, he quietly and without demur or question consented to the renewal of the bills on the defendant's terms. He had all along been pressing for immediate payment of the monies that had already become due; he had been trying to get a definite agreement from the defendant that if he did not meet his liabilities at the end of three months the property should be transferred for a lakh. The defendant admits that "a lakh was the plaintiff's limit." Ma Mi, too, says that when she and Shwe Goh (the plaintiff) had a talk about the sale of the land, he said "he thought it was worth about a lakh and that he would offer that but no more." The evidence of Ma E Byu is to the same effect. She says Ma Mi, in her presence, told Shwe Goh that the defendant had



received an offer of a lakh and a half, on which the plaintiff replied :—

“Who will offer 1½ lakhs or 2 lakhs? He will be lucky if he gets a lakh. Tell him to sell it for a lakh’ I said ‘don’t speak about 1 lakh He would not sell for 1½, not even for Rs. 2,20,000, he said he would not go below 3 lakhs.’ Shwe Goh said ‘If he can get so much he had better sell quick, why wait?’ I said ‘He did not sell; what can I do?’ He said to Ma Mi ‘It is a long time and he has not paid interest, what is he doing?’ Ma Mi said ‘He will pay, he is looking about him.’ Shwe Goh said, ‘Very well, the sooner he pays the better as we have to pay interest.’ ”

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And yet without any objection or further discussion the plaintiff, it is suggested, remained content with the proposal in Exhibit 2, to wait for six months for his interest, payment of which he had been demanding all the time, with a right of pre-emption at an indefinite price far above his limit. The suggestion seems hardly consistent with the admitted facts.

The statements of the defendant in cross-examination regarding Exhibit 2 are by no means satisfactory, and their Lordships are not prepared to say that the Chief Judge’s comment is altogether unwarranted.

The bills were admittedly renewed on the 6th April and were due on the 9th of July following. Before the due date, however, on the 16th of June, the plaintiff wrote to the defendant a letter, Exhibit K, in these terms :—

“I beg to inform you that since the death of my brother Maung Shwe Oh, on the 5th instant, the nature of the circumstances regarding our business has changed. So I wish you to bear in mind that you should not fail to fulfil your promise according to your letter dated the 4th April, 1906. I expect you will strictly make good the promise on or before the appointed date.”

The defendant admits receipt of this letter, but says he took that letter to refer to his letter of the 4th April, which he had given to Nya Bwa. The terms of Exhibit K, however, in their Lordships’ opinion, are not consistent with those of Exhibit 2. Exhibit K. contemplates an early fulfilment of an undertaking or promise of an explicit character; whereas under Exhibit 2 the defendant was not liable for any payment until 4th October. Under Exhibit 2 the plaintiff had only an option to purchase the land for whatever was then

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offered for it, which left it open to discussion and enquiry. There was nothing in it which could be "strictly made good."

Again, Exhibit 2 contemplated that the relative legal position and rights of the parties should remain unchanged for six months, but admittedly when the hundis fell due on the 9th July the bills were not renewed for another three months; no document was executed for the interest; and nothing was done by the defendant to keep matters in *statu quo*. He admits that "in the ordinary course the plaintiff would have wanted more hundis to do that." The only explanation the defendant has to offer of the unusual course adopted is that he thought the plaintiff had taken up the loan himself.

There was an interview between Shwe Goh and the defendant after the bills fell due. Shwe Goh says it was on the 11th of July when Davis told him he could not pay and asked him to pay. Whereupon the plaintiff said he had to pay and would pay, but that the defendant would have to abide by the conditions of the letter of the 4th April, to which the latter replied he would. The defendant admits the interview; he says Nya Bwa came to his daughter who spoke to him and he went and saw Shwe Goh; that he told him he was short of money and could not pay the interest and asked him to pay it for him, to which the plaintiff agreed; and he adds "that was for a further renewal for three months." As a matter of fact the bills were not renewed, nor does the defendant appear to have concerned himself any more with his obligation on them. They were paid off by the plaintiff on the 12th July, *viz.*, the day after the interview, with three days' extra interest.

In their Lordships' opinion neither the conduct of the defendant nor the acts of the plaintiff are consistent with the arrangement in Exhibit 2; they appear to be in accord with the agreement in Exhibit H., which was substantially to the effect that if the defendant failed a third time to meet his liability on the bills for the payment of all interest thereon, the matter was to be treated as concluded, and that the land would be sold to him for the amount stated.

What transpired shortly after is also of importance in the consideration of the case. Four weeks later the defendant wrote to the plaintiff for a loan of Rs. 1,000, which he said he urgently needed for the funeral of his wife. In the letter (Exhibit L) he mentioned that he had sold his Pegu land for Rs. 300,000, and that the loan would be repaid on receipt of the earnest-money on the following Friday. There is no reference, however, either to the liability on the bills and the promissory notes which, according to his story, were outstanding, or to the plaintiff's pre-emptional right under Exhibit 2.

The plaintiff's reply, through his lawyer, was prompt and significant. The letter (Exhibit M), dated the 11th of August, stated that it was well known to the defendant that he could not sell the land to others, as he had contracted to sell to the plaintiff, under whose instructions the writer had commenced drafting a conveyance more than a week before and warned the defendant that, unless he carried out his agreement, he would be sued for specific performance. He also demanded the name of the intending purchaser. To this the defendant replied, through his solicitor, on the 13th of August, denying any such agreement. But the writer adds: "our client did offer to sell, but your client will not agree to pay the price." Their Lordships' attention has not been called to any evidence in support of this statement.

After some further correspondence between the lawyers on the two sides this suit was launched on the 17th of August.

So far the admitted facts and circumstances point to one conclusion. The facsimiles of two admittedly genuine signatures of the defendant, together with the facsimile of the disputed signature, are on the record, and their Lordships have had an opportunity of examining them. With reference to the latter (the signature on Exhibit H), the defendant says as follows:—

'From the signature alone I would not be able to swear whether it was mine or not. The flourish of the 'D,' however, goes further to

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the left than mine generally do. In Exhibit I, (3) I have flourished a little more than usual."

The Judge in the Court of first instance says that he had examined it carefully, and that it revealed no obvious signs of forgery, except that there was a mark of double-writing or correction in the second of the three initials which occurred below the name. Nor do their Lordships perceive any difference between the admitted signatures and the disputed signature.

The mark of double-writing to which the learned Judge refers might be purely accidental; in their Lordships' judgment much importance cannot be attached to it. But his finding does not show that he had formed, on a comparison of all the admitted signatures of the defendant with the disputed signature, a decided opinion that it was a forgery, for, in summing up the case, he expresses himself in these terms:—

"It seems therefore improbable that Davis would have agreed to sell his land for one lakh simply in order to induce Shwe Goh to wait three months for the interest due—a sum of not more than Rs. 5,000. On the other hand, it seems improbable that a man in the position of Shwe Goh should commit or abet the commitment of forgery in order to obtain possession of the land mortgaged to him."

He seems to have been a good deal influenced in his view by the improbability of the defendant agreeing to sell the land for which it was stated large offers had been made, for only a lakh and a temporary accommodation for a comparatively small sum. The learned Judge appears to have overlooked that the whole question of the renewal of the bills was involved in whatever arrangement was arrived at on the 4th of April. The defendant had either to take them up or get them renewed. Had no arrangement been come to, an action on the bills would have jeopardised his prospects of selling the property to advantage. He evidently hoped, and probably was assured by the brokers, that within the three months he would be able either to dispose of the land or raise money by mortgage. The evidence of Ma E Byu already referred to coupled with the statements of Nya Bwa and Ba Pe strongly confirms this view.

Ma Mi admits that about the time when the bills were renewed the plaintiff told her that he was "going to send Nya Bwa with a document" for the transfer of the land for a lakh. "There was a letter on the table before them with a stamp."

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It has to be noted that the defendant as well as his witnesses say the paper which was brought by Nya Bwa, and which Davis refused to sign, though in the form of a letter, bore a stamp. Nya Bwa swears he never saw any stamped agreement in the form of Exhibit II. Their Lordships think it is hardly likely that if a forgery was going to be perpetrated, the plaintiff or his agent after presenting a stamped agreement would forge the signature on an unstamped paper. If the forgery was not successful on one stamped paper, another could have been as easily substituted as an unstamped paper. The story about the letter that was presented to the defendant for execution being stamped seems due to a desire to give it additional coloring or is the outcome of imagination consequent on the bills bearing stamps.

Their Lordships have, after the most careful consideration, come to the conclusion that the defence set up is not true.

But it has been strongly urged by counsel on behalf of the defendant that as a decree for specific performance is discretionary their Lordships, having regard to the onerous character of the bargain, should not affirm the decision of the Chief Court. In the absence of any evidence of fraud or misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract, their Lordships see no reason to accede to the argument. The bargain is onerous, but there is nothing to show that it is unconscionable. The defendant knew all along that a lakh was the plaintiff's limit; it is in evidence that he had frequently urged the defendant's daughter to advise him to sell the land if he was getting a higher offer. It is difficult to say under the circumstances that he took an improper advantage of his position or the difficulties of the defendant.

On the whole their Lordships are of opinion that the decree of the Chief Court is correct, and that this appeal should

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be dismissed with costs, and they will humbly advise His Majesty accordingly.

*Appeal dismissed.*

Solicitors for the appellant: *Sanderson, Adkin, Lee & Eddis.*

Solicitors for the respondent: *A. H. Arnould & Son.*

J. V. W.

## ORIGINAL CIVIL.

*Before Mr. Justice Harington.*

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 June 15.

MATIGARA COAL CO., LD.

v.

SHRAGERS, LD.\*

*Equitable Mortgage—Transfer of Property Act (IV of 1882) s. 59—One of several joint mortgagors, possessing no property comprised in the title deeds deposited, of properties within Ordinary Original Civil Jurisdiction of the High Court—Jurisdiction—Letters Patent, cl. 12—Mortgage Decree.*

Where several joint mortgagors had effected an equitable mortgage by deposit of title deeds, one of them having no interest in any of the properties covered by the deposited title deeds, within the Ordinary Original Jurisdiction of the High Court:—

*Held*, that the defendants having incurred a joint debt and that debt having been secured by them by a deposit of title deeds, they were jointly responsible, and the question whether one of the defendants was interested or not in any of the properties covered by the deposited deeds, in no way affected the question of jurisdiction of the Court.

It is not relevant in such a suit to enquire what interest each one of the mortgagors had in the properties comprised in the title deeds jointly deposited by them.

THE plaintiff Company advanced Shragers, Limited, a sum of money which was secured by the deposit of the title deeds of the Nudkhurki and Isabell Collieries, which were outside the Ordinary Original Civil Jurisdiction of the High Court, and also by way of further security the lease of premises Nos. 10 to 15, Canning Street, within the jurisdiction of this

\* Original Civil Suit, No. 753 of 1910.



Court, which lease was in favour of Adel Shrager, Adolphe Shrager and Kirtikar. Subsequently, in the place of this lease, the lease of certain premises in Old China Bazar Street, in favour of Adolphe and Kirtikar was deposited; Adel Shrager was no party to this lease. It was contended on behalf of the defendant Prokash Chunder Dutt, a puisne mortgagee, that the Court had no jurisdiction to pass a decree against Adel as she had no interest in the properties covered by the deposited lease.

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*Mr. Pugh* and *Mr. Langford James*, for the plaintiff Company. The contention of the defendant Prokash Chunder Dutt, that the plaintiff Company cannot proceed in this suit against Adel Shrager is untenable. The plaintiff Company is suing on its mortgage and is entitled to recover its money by the sale of the mortgaged properties. The Letters Patent, cl. 12, give jurisdiction to this Court: *Srinath Roy v. Godadhur Das* (1). In cases where some of the mortgaged properties, included in the mortgage deed, are within, and some without, the jurisdiction, this Court has jurisdiction to pass a mortgage decree against all the mortgagors. The fact of Adel Shrager being a party to the mortgage is enough to include her in the mortgage decree.

*Mr. A. N. Chaudhuri* (with him *Mr. B. C. Mitter*), for the defendant Prokash Chunder Dutt. Adel Shrager was interested in the lease of Canning Street properties and, therefore, a deposit of the lease would constitute an equitable mortgage of the properties within the jurisdiction of this Court. The Nudkhurki property being outside the jurisdiction of this Court would not matter because it would come under the rule that where in a mortgage some property is within and some property without, this Court has jurisdiction and, therefore, this Court would have jurisdiction to pass a decree against Adel Shrager. But when the deposited lease of the Canning Street properties in which Adel Shrager had an interest, was withdrawn and the lease

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of properties in Old China Bazar Street substituted, in which Adel Shrager had no interest, this Court ceased to have jurisdiction to pass a mortgage decree against her: *Jairam Narayan Raje v. Atmaram Narayan Raje* (1). In suits for land the jurisdiction of Courts is wholly local.

HARINGTON J. This is an action brought on an equitable mortgage against Shragers, Limited,—Adel Shrager, Adolphe Shrager and Kirtikar; two other persons Prokash Chunder Dutt and Naresh Chunder Dey are made defendants as being interested in the mortgaged property. The money advanced on the mortgage was paid through Mr. F. M. Leslie, the attorney, and the defendants other than the last two, subsequent to the advance and the deposit of deeds with Mr. Leslie, sent a memorandum placing on record the fact of the advance and that they deposited the title deeds of the Nudkhurki and Isabell Collieries together with the lease of the premises Nos. 10 to 15/1, Canning Street, by way of collateral security. The same parties, I should say, had executed promissory notes in respect of the advances. Some seven or eight months after the deposit of the deeds in question, the Canning Street lease was withdrawn and there was deposited in place thereof a lease of Nos. 14, 14/1 and 14/4, Old China Bazar Street. The Canning Street lease was in favour of Adolphe, Adel and Kirtikar. The Old China Bazar Street lease was in favour of Adolphe and Kirtikar. The only defendant who has appeared is Prokash and the point which he takes is that this Court has no jurisdiction to make a mortgage decree, because one of the defendants, namely, Adel Shrager is not a party to the Old China Bazar Street lease. Her interest, he says, is only in the property outside the jurisdiction and, therefore, no decree can be made. I am unable to accede to the proposition. The defendants incurred a joint debt and that debt was secured by a mortgage on which they were jointly responsible. The memorandum which was given after the Old China Bazar Street lease was deposited, is signed for Adel Shrager by her duly constituted attorney. She, there-

fore, was a party to and authorised the deposit of that lease. To my mind, the question whether she was a party to the lease itself in no way affects the question of the jurisdiction of this Court. The documents are pledged by the authority of all the mortgagors as security for the repayment of a debt which they jointly incurred. Part of the property so made a security for repayment of the joint debt is within the local limits of the jurisdiction of this Court. I do not think it is relevant to enquire what interest each mortgagor has in the particular properties comprised in the securities, nor do I think, even if it be shown that Adel Shrager had no interest in the deed which she deposited jointly with others, that that affects the jurisdiction of this Court on the mortgage which all the defendants join in making in favour of the plaintiffs. The result is, there will be the usual mortgage decree in favour of the plaintiffs and the plaintiffs are entitled to a declaration of their lien on the shares which belong to the defendants, and liberty is given to apply for the sale of the same, if necessary. Prokash will pay costs of the action on scale No. 2.

G. M. F.

*Judgment for plaintiffs.*

Attorneys for the plaintiffs: *Leslie and Hinds.*

Attorney for the defendant, Prokash Ch. Dutt: *Nripendra Nath Dutt.*

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## CRIMINAL REVISION.

*Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.*

1911

June 23.

AMODINI DASEE

v.

DARSAN GHOSE.\*

*Review in Criminal Cases—Power of a Division Bench of the High Court to review its judgment discharging a Rule before signature—Discharge of the accused in a part-heard case for absence of remaining witnesses without consideration of the evidence already on the record—Criminal Procedure Code (Act V of 1898) ss. 253, 369—Practice.*

It is competent to a Division Bench of the High Court, which has erroneously discharged a Rule on a point of law and a misapprehension of the facts in connection therewith, to review its judgment before it has been signed.

*In the matter of the petition of Gibbons (1), Queen-Empress v. Iqbal Tiwari (2) referred to.*

*Queen-Empress v. Fox (3) dissented from.*

Where a Magistrate, after some of the prosecution witnesses had been heard by another Bench of Magistrates, discharged the accused because the other witnesses were not present, the High Court set aside the order of discharge and directed him to dispose of the case after argument with reference to the evidence already on the record.

On the 11th May, 1910, the petitioner filed a complaint, before the Sub-Divisional Magistrate of Baraset, against the accused, Darsan Ghose, charging him with cheating and criminal breach of trust. The case was compromised and the accused discharged, on the 22nd August, on a petition presented by him. Thereafter the petitioner applied to the same Magistrate for a revival of the case alleging that the petition of compromise was fraudulent inasmuch as it contained terms to which she had not consented. The Sub-Divisional Officer,

\* Criminal Revision. No. 440 of 1911, against the order of B. N. Mookerjee, Sub-Divisional Magistrate of Baraset, dated January 10, 1911.

(1) (1886) I. L. R. 11 Cal. 42.

(2) (1899) I. L. R. 21 All. 177.

(3) (1885) I. L. R. 10 Bom. 176.

after examining the petitioner and calling for and receiving a report from a subordinate Magistrate, issued a summons against the accused, on the 7th October, under section 417 of the Penal Code. The case was transferred to an Honorary Bench. The trial of the accused commenced on the 1st December, when three witnesses for the prosecution were examined. The accused then took an objection to the jurisdiction of the Bench to hold the trial which was overruled on the 14th December, whereupon he applied for, and obtained, an adjournment till the 7th January, 1911, in order to move the High Court for a transfer. On the 9th January the Sub-Divisional Magistrate withdrew the case to his own file and took it up the next day. The petitioner alleged that, as it was understood that the High Court would be moved for a transfer and there was a possibility of a trial *de novo*, she had not her remaining witnesses present. She applied for an adjournment to enable her to summon them, but the Magistrate refused to grant it and passed the following order: "Complainant present. No evidence is produced. Accused discharged under section 253 Cr. P. C. True—S. 417 I. P. C."

The petitioner, after an ineffectual application to the District Magistrate of Alipore for further inquiry, moved the High Court and obtained a Rule to set aside the order of discharge on the ground that the lower Court ought to have considered the evidence already on the record, and to have held that the same established a *prima facie* case against the accused.

The Rule came on for hearing before a Bench composed of Caspersz and Sharfuddin JJ., on the 16th June, 1911, but was discharged on the ground that the Sub-Divisional Magistrate had no jurisdiction to revive an order of discharge passed by another Magistrate. A few minutes after the judgment was delivered, and before it was signed, the petitioner's vakil drew their Lordships' attention to the Full Bench case of *Mir Ahwad Hossein v. Mahomed Askari* (1), and pointed out that the Sub-Divisional Magistrate had revived an order of dis-

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charge passed by himself. Their Lordships subsequently re-heard the case.

*Babu Bhudeb Chandra Roy*, for the petitioners.

*Babu Prabodh Kumar Das*, for the opposite party.

CASPERSZ AND SHARFUDDIN JJ. When this Rule was heard on the 16th June last, we delivered judgment discharging the same, but on the same day, the case of *Mir Ahwal Hossein v. Mahomed Askari* (1) was brought to our notice, and it subsequently appeared that we were under a misapprehension on the facts of the case. As we had not signed our judgment, we thought it proper to hear both the learned vakils again to-day.

It has been contended by the learned vakil for the opposite party that we cannot, having once delivered our judgment, review the same. We entertain no doubt that it is competent to us to do so. The terms of section 369 of the Criminal Procedure Code are general, and we have not signed our judgment. The same view may reasonably be inferred from the case of *In the matter of the petition of Gibbons* (2) and a very extreme case is that of *Queen-Empress v. Lalit Tiwari* (3), where it was held that a judgment or order of the High Court is not complete until it is sealed in accordance with the Rules of the Court, and up to that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken.

Our attention was called to a case of the Bombay High Court, *Queen-Empress v. Fox* (4). If that case is an authority for the proposition advanced, we must respectfully decline to follow it. We, therefore, proceed to consider this Rule on the merits.

We are invited in this Rule to set aside an order of the Deputy Magistrate discharging the accused, under section 253 of the Criminal Procedure Code, on the 10th January, 1911.

(1) (1902) I. L. R. 29 Calc. 726.

(3) (1899) I. L. R. 21 All. 177.

(2) (1886) I. L. R. 14 Calc. 42.

(4) (1885) I. L. R. 10 Bom. 176.



The petitioner charged the accused with an offence under section 417 of the Indian Penal Code, but the accused was discharged on the 22nd August, 1910, by the Deputy Magistrate. The petitioner, however, obtained an order reviving her case from that Magistrate, and it was sent for disposal by the Bench of Honorary Magistrates at Baraset. The Magistrates thereupon examined three witnesses. On the 9th January, 1911, the Deputy Magistrate withdrew the case to his own file, and, next day, passed the following order:—"The complainant present. No evidence is produced. Accused discharged under section 253 of the Criminal Procedure Code. True—section 417 of the Indian Penal Code."

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It is this second order of discharge that we are asked to set aside on the ground that the Deputy Magistrate ought to have considered the evidence already on the record and to have held that the same established a *prima facie* case against the accused.

It is clear on the authority of the Full Bench in *Mir Ah-wad Hossein v. Mahomed Askari* (1), that it was competent to the Deputy Magistrate to revive the case on application made to him. The case was regularly inquired into by the Baraset Bench. The only defect in the procedure is that the Deputy Magistrate has not said a single word in his order of the 10th January last to show that he had considered the evidence in any way. What the petitioner now seeks is that the evidence should be considered.

We do not desire to fetter the discretion of the Deputy Magistrate in any way, but we suggest that he do fix a date and call upon both parties to appear on that day. Then, arguments should be heard with reference to the evidence already on the record. If, in the opinion of the Deputy Magistrate, the case should not be gone into any further, it will be competent to him to pass an order of discharge under section 253 of the Criminal Procedure Code, which, in that event, will be a perfectly legal order to pass. The Rule is made absolute.

F. H. M.

*Rule absolute.*

## CIVIL RULE.

Before Mr. Justice Holmwood and Mr. Justice D. Chatterjee.

1911

June 29.

CHAITAN PATGOSI MAHAPATRA

v.

KUNJA BEHARI PATNAIK.\*

*Jurisdiction of High Court—Revision—Appeal wrongly laid before Collector instead of District Judge—Procedure by Deputy Collector under s. 109 of the Rent Recovery Act—Civil Procedure Code, how far governs Act X of 1859—Act X of 1859, s. 109—Civil Procedure Code (XIV of 1882), s. 310A.*

The High Court has jurisdiction to interfere with the orders of the Collectors and Deputy Collectors, passed under Act X of 1859.

*Huro Mohun Mookerjee v. Kedarnath Doss* (1) commented on.

*Bhyrub Chunder Chunder v. Shama Soonderee Debea* (2), *Gobind Coomar Chowdhry v. Kisto Coomar Chowdhry* (3), *Deanutoollah v. Nowab Nazim Sidhee Nuzzar Ali Khan Bahadoor* (4), *Gudadhur Chatterjee v. Nund Lall Mookerjee* (5), *Sreemuttu Nassir Jan v. Akbur Mozoomdar* (6), *Nilmoni Singh Deo v. Taranath Mukerjee* (7) referred to.

*Mohant Gobind Ramanuja Das v. Lakhun Parida* (8) explained.

The jurisdiction of the Deputy Collector under Act X of 1859 being a limited one, and the procedure under s. 109 of the said Act not being strictly followed, a sale under s. 109 must be held to be *ultra vires*.

*Deanutoollah v. Nowab Nazim* (4) referred to.

Except upon points expressly provided for by Act X of 1859, the procedure of the Revenue Courts must be governed by the Civil Procedure Code.

The *ratio decidendi* of *Nilmoni Singh Deo v. Taranath Mukerjee* (7) followed.

*Harish Chandra Ghose v. Ananta Charan Patra* (9) doubted.

*Adhirani Narain Kumari v. Raghu Mohapatra* (10) approved of.

*Radha Madhub Santra v. Lukhi Narain Roy Chowdhry* (11) and *Mokunda Bullav Kar v. Bhogaban Chunder Das* (12) discussed.

\* Civil Rule, No. 51 of 1910, against the order of John Clark, Collector of Puri, dated Oct. 4, 1909.

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| (1) (1866) 5 W. R. (Act X) 25. | (7) (1882) I. L. R. 9 Calc. 295.   |
| (2) (1866) 6 W. R. (Act X) 68. | (8) (1906) 11 C. W. N. 112.        |
| (3) (1867) 7 W. R. 520.        | (9) (1897) 2 C. W. N. 127.         |
| (4) (1868) 10 W. R. 341.       | (10) (1885) I. L. R. 12 Calc. 50.  |
| (5) (1869) 12 W. R. 406.       | (11) (1893) I. L. R. 21 Calc. 428. |
| (6) (1871) 15 W. R. 418.       | (12) (1894) I. L. R. 21 Calc. 514. |

*Nagendro Nath Mullick v. Mathura Mohun Parhi* (1) explained.

*Hare Krishna Mahanti v. Bishnu Chandra Mahanti* (2), *Ram Lochan Singh v. Beni Prasad Kumri* (3), and *Madho Prakash Singh v. Murli Manohar* (4) referred to.

Where a sale under Act X of 1859 is impeached as *ultra vires* and illegal or the sale is rightly sought to be set aside under s. 310A of the Code of Civil Procedure (XIV of 1882), the proceedings of the Deputy Collector are amenable to the revisional jurisdiction of the High Court in either case. The fact that the original suit was valued at above Rs. 100 and an appeal lay to the District Judge and not to the Collector, before whom the appeal was, in reality, heard, does not take away the right of the High Court to interfere in revision.

CIVIL RULE obtained by the judgment-debtor.

The petitioner in this rule was the judgment-debtor in a suit for rent, in which a decree was given for Rs. 175. In execution, the decree-holder sought to proceed not against the person or moveable property of the judgment-debtor, nor even against the land for the rent of which he had obtained a decree (the land being found to be not transferable), but against certain other immoveable property belonging to the judgment-debtor. With that object in view, the decree-holder filed an affidavit, stating that he had ascertained that some of the property mentioned in the plaint did not belong to the judgment-debtor, and that he was making away with other property. It was indeed clear that the property which, according to the defendant, did not belong to the judgment-debtor was the very property for rent of which a decree had been obtained. Upon receipt of this affidavit, the Deputy Collector, without further inquiry and without any preliminary notice to the judgment-debtor, issued an attachment order and a sale proclamation on the 15th May, 1909, and sold this other property, which was a *mafi kharida* land in Puri. On the 17th May, the judgment-debtor came in and filed a petition, stating that he had no knowledge of these proceedings and asking permission to deposit the decretal amount together with costs, etc., and asking that the sale might be set aside. On this petition, the De-

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(1) (1891) I. L. R. 18 Calc. 365. (3) (1908) I. L. R. 36 Calc. 252.  
(2) (1908) I. L. R. 35 Calc. 799. (4) (1883) I. L. R. 5 All. 406.

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puty Collector allowed four days' time for payment of the decretal amount and ordered notice to be issued to the auction-purchaser. After an adjournment at the instance of the auction-purchaser and after the hearing of the case on the 28th and 31st May, in the presence of both parties, the judgment-debtor filed a petition on the 2nd June, the date fixed for delivering judgment, stating that by mistake he had deposited less than he should have done and asking permission to deposit the remaining sum. The Deputy Collector granted the petition and the money was actually deposited on the 5th June. On the 2nd June further arguments were heard and the case adjourned to 14th June for judgment. On that day, the Deputy Collector refused to set aside the sale, holding that there was no provision in Act X of 1859, entitling the decree-holder to have the sale set aside on deposit of the decretal amount and that s. 174 of the Bengal Tenancy Act did not apply.

On appeal to the Collector, he dismissed the appeal, holding on the authority of *Harish Chandra Ghose v. Ananta Charan Patra* (1), that section 310A of the Code of Civil Procedure did not apply to sales under Act X of 1859, and as such the appellant had no remedy by an application for setting aside the sale.

The judgment-debtor thereupon applied to the High Court for setting aside the orders of both the lower Courts.

On the application, a Rule was issued by Brett and Sharfuddin JJ. The Rule was first heard on the 10th July, 1910, by Holmwood and D. Chatterjee JJ., who remanded the case to the Collector for findings as to whether the undertenure for which decree was obtained, as also the one that was actually sold, were saleable. The findings were returned to the High Court.

\* *Babu Narendru Kumar Bose*, for the auction-purchaser (opposite party), raised a preliminary objection that the High Court had no jurisdiction to interfere in revision, the order being final. The Commissioner or the Board of Revenue

could interfere: see sec. 152 of Act X. of 1859; *Huro Mohun Mookerjee v. Kedarnath Doss* (1).

*Babu Bipin Bihari Ghose* (with him *Babu Nagendranath Ghose*), for the petitioner. The case cited by my learned friend, has practically been over-ruled by the Full Bench decision in *Gobind Coomar Chowdhry v. Kisto Coomar Chowdhry* (2), and the Privy Council case of *Nilmoni Singh Deo v. Taranath Mukerjee* (3). See also *Bhyrub Chunder Chunder v. Shama Soonderee Debea* (4), *Deanutoollah v. Nowab Nazim* (5), *Gudadhur Chatterjee v. Nund Lall Mookerjee* (6), *Rooknee Roy v. Amrith Lall* (7), *Sreemutty Nassir Jan v. Akbur Mozoomdar* (8), *Mohant Gobind Ramanuja Das v. Lakhun Parida* (9). In all these last-mentioned six cases, the High Court interfered. There are cases where the High Court entertained jurisdiction, but refused to interfere on the merits: *Drobo Moyee Dabee v. Bipin Mundul* (10), *Narainee Dabee v. Chundee Churn Chowdhry* (11), *Dursun Bhugut v. Mahmmed Ali* (12). Some of the orders so revised by the High Court were appellate orders of the Collectors. Section 152, cl. (2) was inapplicable. The order passed was after decree and in execution. See section 151. The Collector's appellate order was *ultra vires*, as no appeal lay to him.

*Babu Narendra Kumar Bose*, in reply. When a Collector has legally exercised jurisdiction on appeal, the High Court cannot interfere. See section 152. *Bhyrub Chunder Chunder v. Shama Soonderee Debea* (4), and *Rooknee Roy v. Amrith Lall* (7) were cases where the Collector had wrongly exercised jurisdiction and usurped the function of the District Judge. In *Gobind Coomar Chowdhry v. Kisto Coomar Chowdhry* (2), the order revised by this Court was an original order passed by the Deputy Collector. In this case, the petitioner,

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| (1) (1866) 5 W. R. (Act X) 25.   | (6) (1869) 12 W. R. 406.    |
| (2) (1867) 7 W. R. 520.          | (7) (1870) 14 W. R. 254.    |
| (3) (1882) I. L. R. 9 Calc. 295; | (8) (1871) 15 W. R. 418.    |
| I. R. 9 F. A. 174.               | (9) (1906) 11 C. W. N. 112. |
| (4) (1866) 6 W. R. (Act X) 63.   | (10) (1868) 10 W. R. 6.     |
| (5) (1868) 10 W. R. 341.         | (11) (1869) 11 W. R. 512.   |
| (12) (1870) 13 W. R. 438.        |                             |

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*viz.*, the judgment-debtor himself, appealed to the Collector. He cannot now question the jurisdiction of the Collector. All the other cases cited are distinguishable.

[CHATTERJEE J. We think we can interfere in revision.]

Act X of 1859 is a self-contained Act. It has been held that the provisions of the Civil Procedure Code and the Limitation Act do not govern Act X of 1859: *Nagendro Nath Mullick v. Mathura Mohun Parhi* (1), *Radha Madhub Santra v. Lukhi Narain Roy Chowdhry* (2). These two decisions are later than the Privy Council decision in *Nilmoni Singh's* case (3). *Harish Chandra Ghose v. Ananta Charan Patra* (4), is a direct authority for holding that only those sections of the Civil Procedure Code, which provide for sale and for proceedings leading up to it are applicable and that section 310A does not apply. So also are *Anund Mohun Surmah Talookdar v. Grijā Kant Lahoory* (5) and *Brojo Gopal Sarkar v. Busirunnissa Bibi* (6) in the latter of which *Nilmoni Singh's* case (3) was fully considered. Moreover, in this case, the petitioner had applied under s. 311. If the sale is *ultra vires*, the proper course for the judgment-debtor to adopt is to bring a suit. No application lies with regard to s. 310A, or a similar provision. And section 310A was added long after Act X of 1859 was enacted: see *Asiruddi Mondal v. Mokhoda Moyee Dasi* (7), and *Ali Miah v. Ramjan Khan* (8). See also Maxwell on Interpretation of Statutes, 4th edition, pp. 275 and 628. Section 109 of Act X of 1859 also did not apply to this sale. That section relates to decrees for money and not rent-decrees. This Court should not entertain an application, as an appeal would lie to the District Judge, if the Civil Procedure Code applied after sale.

*Babu Bepinbihari Ghose*, in reply. The findings of the lower Court are evidently wrong. Assuming they are correct, the procedure under section 109 of Act X has not been strictly

(1) (1891) I. L. R. 18 Calc. 363. (4) (1897) 2 C. W. N. 127.

(2) (1893) I. L. R. 21 Calc. 428. (5) (1870) 13 W. R. 222.

(3) (1882) I. L. R. 9 Calc. 295; (6) (1887) I. L. R. 15 Calc. 179.

L. R. 9 I. A. 174.

(7) (1908) I. L. R. 35 Calc. 543.

(8) (1908) 13 C. W. N. 224.



observed. The sale is, therefore, *ultra vires*. *Deanutoollah v. Nowab Nazim* (1), and *Nagendro Nath Mullick v. Mathura Mohun Parhi* (2), are inapplicable. *Kadha Madhub Santra v. Lukhi Narain Roy Chowdhury* (3) and *Harish Chandra Ghose v. Ananta Charan Patra* (4) are opposed in effect to the case of *Nilmoni Singh* (5). If the Civil Procedure Code is inapplicable after sale how is delivery of possession to be given? Act X of 1859 is not a self-contained Code: *Hare Krishna Mahanti v. Bishnu Chandra Mahanti* (6) and *Ram Lochan Singh v. Beni Prasad Kumri* (7). See also *Paresh Nath Singha v. Nobogopal Chattopadhyaya* (8) on the question whether s. 310A can apply. See also *Ali Miah v. Ramjan Khan* (9). The sale was wholly *ultra vires*. An appeal being precluded under section 131 of Act X, our only remedy is in revision. A suit will not lie if the order of the Deputy Collector is not reversed.

*Babu Probodh Chandra Chatterjee*, for the decree-holder (opposite party).

*Cur. adv. vult.*

HOLMWOOD and CHATTERJEE JJ. The Deputy Collector passed a decree for over Rs. 100 for the rent of a *tanki* tenure. The learned Deputy Collector has upon a remand by this Court found that these *tanki* tenures are not transferable. The decree-holder put in an application for execution and soon after an application that some other property of the judgment-debtor might be sold: this other property, a *kharida mafi* tenure of the judgment-debtor was accordingly sold. Having come to know of the sale, he deposited the decretal amount with costs and the 5 per cent. payable to the auction-purchaser and asked for the cancelment of the sale: he also alleged fraud, irregularity and loss. The Deputy Collector held that section 310A of the Civil Procedure Code, did

(1) (1868) 10 W. R. 341.

(2) (1891) I. L. R. 18 Cal. 368.

(3) (1893) I. L. R. 21 Cal. 428.

(4) (1897) 2 C. W. N. 127.

(5) (1882) I. L. R. 9 Cal. 295;

L. R. 9 I. A. 174.

(6) (1908) I. L. R. 35 Cal. 799.

(7) (1908) I. L. R. 36 Cal. 252.

(8) (1901) I. L. R. 29 Cal. 1.

(9) (1908) 13 C. W. N. 224.

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not apply to sales under Act X of 1859 and there was no other law under which he could set aside the sale. On an appeal, the Collector upheld the decision of the Deputy Collector, and on motion to us, we at first issued the above rule, and being desirous to know whether the property had been rightly sold in accordance with law, we asked for findings as to the nature of the tenure in respect of which arrears had been decreed and also the one sold. The findings have been sent and at the further hearing of the rule a preliminary objection has been taken that we have no jurisdiction to interfere with the orders of the Deputy Collector and Collector passed under Act X of 1859 and reliance is placed on the case of *Huro Mohun Mookerjee v. Kedar Nath Doss* (1). In this case L. S. Jackson and Glover JJ., held that the power of control and superintendence given by section 15 of the Charter Act, was in reference to the General Appellate Jurisdiction of the Court and not to particular cases in which that jurisdiction is extraordinarily exercised or to a superintendence vested in the Commissioner and the Board of Revenue by the express provisions of the Act. This view certainly supports the objection, but it has been subsequently departed from in a series of cases and virtually overruled. Very soon after the above case, was decided the case of *Bhyrub Chunder Chunder v. Shama Soonderee Debea* (2), in which Norman J. said: "It is clear that the Collector's Court is a Court over which at the time of the passing of the Charter Act the Sudder Court possessed Appellate Jurisdiction and therefore it is clear that the 15th section of the Charter Act gives us a superintendence over such Courts for the purpose to which I have already alluded:" the purpose is set out in the earlier part of the judgment and is "to compel them to do any act which by law they should do, to command them to execute all powers with which they are vested and to restrain them from meddling when they have no jurisdiction." L. S. Jackson J. agreed. This was a case in which the Collector had entertained an appeal which lay to the District Judge. The same question came before the

(1) (1866) 5 W. R. (Act X) 25. (2) (1866) 6 W. R. (Act X) 68.

Full Bench in the next year in the case of *Gobind Coomar Chowdhry v. Kista Coomar Chowdhry* (1). In this case the Deputy Collector refused to entertain an application for restitution of an excess realized in execution of a decree subsequently modified. The Judge did not entertain an appeal as he thought an appeal was incompetent as the matter was subsequent to decree. The High Court compelled the Deputy Collector to entertain the application. It may be noted that there is no provision for such restitution in Act X of 1859 and the order must have been made in accordance with the general Civil Procedure Code.

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Then in the case of *Deanutoollah v. Nowab Nazim Sidhee Nuzzer Ali Khan Bahadoor* (2), Sir Barnes Peacock C.J. and D. N. Mitter J. held that Act X of 1859 confers upon the Revenue Courts merely a limited jurisdiction and the High Court under its general power of control has the right to prevent them for exceeding that jurisdiction. In this case the attachment and sale order passed by a Collector in respect of properties of the judgment-debtor other than the tenure in arrear was set aside by the High Court as it was not shown that the Collector was satisfied that execution could not be obtained against the person and moveable property of the judgment-debtor.

In the case of *Gudadhur Chatterjee v. Nund Lall Mookerjee* (3), the order of the Collector ordering execution against a person against whom the decree passed had been cancelled, was set aside by the High Court. In the case of *Rooknee Roy v. Amrith Lall* (4), an appellate decree of the Collector was set aside as passed without jurisdiction. In the case of *Sreemutty Nassir Jan v. Akbur Mozoomdar*, (5), the Collector was compelled to entertain an intervention which he had disallowed. The matter went up to the Privy Council in the case of *Nilmoni Singh Deo v. Taranath Mukerjee* (6). In that case an order of the Collector transferring a decree for

(1) (1867) 7 W. R. 520.

(2) (1868) 10 W. R. 341.

(3) (1869) 12 W. R. 406.

(4) (1870) 14 W. R. 254.

(5) (1871) 15 W. R. 418.

(6) (1882) I. L. R. 9 Calc. 295;  
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execution to another district was set aside by the High Court as passed without jurisdiction on the authority of *Gobind Coomar Chowdhry v. Kisto Coomar Chowdhry* (1), and their Lordships of the Judicial Committee agreed with the High Court as to its jurisdiction under section 15 of the Charter Act.

The case of *Mohant Gobind Ramanuja Das v. Lakhun Parida* (2), may seem at the first blush to go a step further, but we think it is quite in keeping with the older decisions read by the light of the decision of the Judicial Committee in the case of *Nilmoni Singh Deo v. Taranath Mukerjee* (3).

We have therefore no doubt that we have jurisdiction to interfere under section 15 of the Charter Act. It was further contended by the learned vakil for the opposite party that as the original suit was valued at above Rs. 100 an appeal lay to the District Judge and not to the Collector and we cannot, therefore, interfere in revision. We cannot uphold this objection. In the first place the sale in this case is impeached as *ultra vires* and illegal, and in the second place, the case was one under section 310A of the Civil Procedure Code, the auction-purchaser being a third party, and in either case the proceedings of the Deputy Collector are amenable to the revisional jurisdiction of this Court and not to an appeal.

On the merits of the case it is contended by the learned vakil for the petitioner, firstly, that the learned Deputy Collector had no jurisdiction to hold the sale of other *lakhiraj* property of the petitioner in the manner in which he did it and that on that ground the sale and all subsequent proceedings are *ultra vires* and void; and secondly, that the learned Deputy Collector was quite competent to entertain the application under section 310A of the Civil Procedure Code and in refusing to do so refused to exercise a lawful jurisdiction.

On the first point the learned Deputy Collector has found that the *tanki* tenure in respect of which arrears had been decreed was not saleable. The case therefore was clearly one

(1) (1867) 7 W. R. 520.

(2) (1906) 11 C. W. N. 112.

(3) (1882) I. L. R. 9 Calc. 295;  
I. L. R. 9 I. A. 174.

under section 109 of Act X of 1859 and the other property of the petitioner could be sold only if satisfaction of the judgment could not be obtained by execution against his person or moveable property. In this case that procedure was not followed. There is nothing to shew that any attempt was made to execute the decree against the person or the moveable property of the petitioner. All that the learned Deputy Collector says is "on the 26th February, 1909, the decree-holder made an affidavit that the *tanki* tenure for which he had obtained a decree for arrears having been allotted for the *sheba* of Jagganath temple other properties of the judgment-debtor may be sold for realization of the decretal amount and according to his prayer the *mafi kharida* land 1.62 acres were sold." As the jurisdiction of the Deputy Collector is a limited one and the procedure under section 109 was not followed, the sale of the *lakhiraj* land of the judgment-debtor was *ultra vires* and must be set aside. See *Deanutoollah v. Nowab Nazim Sidhee Nuzzer Ali Khan Bahadur* (1).

The second question raised by the petitioner is whether section 310A was applicable to the case. If the sale had been held in due compliance with the provisions of sections 109 and 110, the sale would be "under the provisions of the law for the time being in force, applicable to the sale of such undertenures for demands other than those of arrears of rent due in respect thereof," i.e., under the provisions of the Civil Procedure Code. This would naturally attract all the provisions of the Civil Procedure Code with regard to sales, from attachment to delivery of possession at least and there is no special provision in Act X of 1859 dealing with these matters. It is contended, however, that only those sections of the Code are applicable which provide for proceedings up to and inclusive of the sale and none else. Reliance is placed for this contention on the case of *Harish Chandra Ghose v. Ananta Charan Patra* (2). The learned Judges are reported to have said "the Code of Civil Procedure ap-

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(2) (1897) 2 C. W. N. 127.

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plies up to the sale and does not apply after. Section 310A comes in after the provisions relating to sale." Although there is no discussion of the reasons *pro* and *con* and no reference is made to what the law is after sale in such cases we should have felt ourselves somewhat embarrassed by this case if it were not for the further contention of the learned vakil that this decision is in direct contravention of the *ratio decidendi* of the case of *Nilmoni Singh Deo v. Taranath Mukerjee* (1), decided by the Privy Council in 1882 and not referred to by the learned Judges. That was a case in which their Lordships had to consider whether a Collector could transfer a decree for rent for execution to a Civil Court in another district. The High Court had held that there was no provision for such a transfer in Act X of 1859 and the transfer was therefore incompetent. Their Lordships in setting aside the order of the High Court say that Revenue Courts deciding suits under Act X of 1859 are Civil Courts and "there is nothing in the Act (X of 1859) which provides for any execution beyond his (Collector's) jurisdiction and there is nothing to forbid the conclusion that such executions are left to the operations of Act XXXIII of 1852 or the corresponding portion of Act VIII of 1859." This and other reasons given for the decision seem to leave no room for doubt that their Lordships thought that except upon points expressly provided for by Act X of 1859, the procedure of the Revenue Courts when trying questions arising under that Act must be governed by the Civil Procedure Code. It cannot be said, however, that the *ratio decidendi* of their Lordships has been uniformly kept in sight in subsequent cases. The majority of the Allahabad Court followed up the said reasoning of their Lordships and held that section 43 of the Civil Procedure Code was applicable to rent suits under Act XII of 1881, the local rent act. This decision of the Allahabad Court was followed by our own Court in the case of *Adhirani Narain*

(1) (1882) I. L. R. 9 Calc. 295; L. R. 9 I. A. 174.



*Kumari v. Raghu Mohapatro* (1). In the case of *Radha Madhub Santra v. Lukhi Narain Roy Chowdhry* (2), the learned Judges held that section 373 of the Civil Procedure Code did not apply to suits before revenue authorities. Mr. Justice Amir Ali, as he then was, who delivered the judgment of the Court said: "We think the point has been virtually decided by the reasoning in the Full Bench decision in *Nagendro Nath Mullick v. Mathura Mohun Parhi* (3). The latter case, however, was in respect of the provisions of section 14 of the Limitation Act applying to rent suits in Revenue Courts.

The learned Judges said "Act X of 1859 has always been considered a code complete in itself and unaffected by the general laws of limitation of procedure." The discussion was confined to the question of limitation and the case of *Nilmoni Singh Deo* (4), was not so much as mentioned. The expression "complete code" must therefore be understood as complete as to matters specially provided for in the Act. In this view of the case it was not a sound basis for the judgment in *Radha Madhub Santra v. Lukhi Narain Roy Chowdhry* (2). In the next case on the point, however, *Mokunda Bullav Kar v. Bhogaban Chunder Das* (5), another Bench held the same view as to section 373. The learned Judges say as to the case of *Nilmoni Singh* (4), that it held that "there being nothing in Act X of 1859 to prohibit the Collector acting under that Act from transferring an execution case from his own file to the file of a Civil Court, the procedure laid down in the Civil Procedure Code might be followed in the matter of the transfer of the decree for execution to some other Courts": and they distinguish it as not specifically dealing with section 373 of the Civil Procedure Code. With great deference to the learned Judges we may point out that the Judicial Committee in the case of *Nilmoni Singh* (4) does not hold that the provisions of the Civil Procedure Code might be followed as if the Col-

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- (1) (1885) I. L. R. 12 Calc. 50. (4) (1882) I. L. R. 9 Calc. 295;  
(2) (1893) I. L. R. 21 Calc. 428. L. R. 9 I. A. 174.  
(3) (1891) I. L. R. 18 Calc. 368. (5) (1894) I. L. R. 21 Calc. 514.

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lector had a discretion in the matter, but their Lordships say "These considerations lead to the conclusion that the Rent Courts established by Act X of 1859 must be held to fall within section 284 of Act VIII of 1859 of the same year." Section 284 of Act VIII of 1859 runs as follows: "A decree of any Civil Court. . . . which can not be executed within the jurisdiction of the Court, whose duty it is to execute the same may be executed within the jurisdiction of any other such Court in the manner following." The result of the ruling of their Lordships is, we think, that the provisions of the Civil Procedure Code must be followed in such cases. In the case of *Hare Krishna Mahanti v. Bishnu Chandra Mahanti* (1) Stephen and Mukerjee JJ. express a serious doubt as to whether in view of the ruling in *Nilmoni Singh's* (2) case, it can still be said that Act X of 1859 is a complete code in itself in the sense of excluding the application of the Civil Procedure Code to proceedings thereunder. In the case of *Ram Lochan Singh v. Beni Prasad Kumri* (3), another Bench of this Court relied upon the case of *Nilmoni Singh* (2) and the Full Bench ruling of the Allahabad Court in *Madho Prakash Singh v. Murl Manohar* (4), for holding that the provisions of section 492 of the Civil Procedure Code as to injunctions applied to rent decrees under the North-Western Province Rent Act, XII of 1881, transferred for execution to a Civil Court. We think, therefore, that the cases decided in disregard or under a misconception of the ruling of the Privy Council in the case of *Nilmoni Singh* (2) cannot stand in the way of our holding that section 310A of the Civil Procedure Code was applicable to the present case and the learned Deputy Collector failed to exercise a lawful jurisdiction vested in him by law.

In the result, therefore, the orders of the Deputy Collector and the Collector are set aside. The sale is held to be *ultra vires* and void.

The parties are relegated to the position in which they were before the sale. The auction-purchaser will get back

(1) (1908) I. L. R. 35 Cal. 799. (3) (1908) I. L. R. 36 Cal. 252.

(2) (1882) I. L. R. 9 Cal. 295; (4) (1883) I. L. R. 5 All. 406.

I. L. R. 9 I. A. 174.

the amount paid by him, the decree-holder will realize his decretal amount, first, from the deposit made by the petitioner under section 310A and any balance in due course of law. Each party will pay its own costs in connection with this proceeding in all Courts.

S. M.

*Rule absolute.*

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## APPELLATE CIVIL.

*Before Mr. Justice Gore and Mr. Justice Teunon.*

JYOTI PRASAD SINGH

v.

LACHIPUR COAL COMPANY.\*

1911  
July 11.

*Mineral rights—Lease—Lessee for years or for life—Lessee in perpetuity—Intention of parties—Landlord's rights.*

It is well settled in England that a tenant for life or for years has no right to work unopened mines.

*Olegg v. Rowland* (1), and *Campbell v. Wardlaw* (2) referred to.

*Gordon, Stuart & Co. v. Tikaitnee Seobas Kowaree* (3) not followed. *Prince Mahomed Buktyar Shah v. Rani Dhojamani* (4) and *Tituram Mukerji v. Cohen* (5) referred to.

There is no difference in principle between a lessee for years and a lessee in perpetuity, when nothing is known or can be inferred about the intentions of the parties at the time of the inception of the lease. The landlord continues to have a reversion in mines discovered after the inception of the lease.

*Kally Dass Ahiri v. Monmohini Dassee* (6) referred to. *Abhiram Goswami v. Shyama Charan Nandi* (7) followed. *Sonet Koor v. Himmut Bahadoor* (8) referred to.

*Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* (9) not followed.

\* Appeal from Original Decree, No. 388 of 1906, against the decree of Gopi Krishna Banerjee, Subordinate Judge of Burdwan, dated May 16, 1906.

(1) (1866) 2 Eq. 160.

(6) (1897) I. L. R. 24 Calc. 440.

(2) (1883) 8 App. Cas. 641.

(7) (1909) I. L. R. 36 Calc. 1003.

(3) (1864) W. R. 370.

(8) (1876) I. L. R. 1 Calc. 391;

(4) (1905) 2 C. L. J. 20.

L. R. 3 I. A. 92.

(5) (1905) I. L. R. 33 Calc. 203; (9) (1911) I. L. R. 38 Calc. 526.

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*Shama Charan Nandi v. Abhiram Goswami* (1) and *Mogh Lai Pandey v. Rajkumar Thakur* (2) distinguished.

*Brojānath Bose v. Durga Prosad Singh* (3) not followed and held to be practically overruled by *Hari Narayan Singh Deo v. Sriram Chakravarti* (4).

APPEAL by Raja Jyoti Prasad Singh Deo Bahadur and another, the plaintiffs.

The plaintiff No. 1 in the suit under appeal was the present proprietor of the Pachete Estate, and plaintiff No. 2 was the manager of the estate under the Encumbered Estates Act.

The dispute in the suit was with reference to the mineral and underground rights of a village called Panchgachia appertaining to the Pachete Estate. The plaintiff's case was that the defendants Nos. 5 to 35 were in occupation of the surface rights of *mauza* Panchgachia in *jamai* right, the recorded tenants in the records of the estate being one Kashinath Upadhyaya and others and that on the 24th June, 1902, plaintiff No. 2 was for the first time informed that the Company defendants had been working coal in the said *mauza* Panchgachia. The plaint further stated that on enquiry plaintiff No. 2 came to know that about 1900 A.D., the defendant Company acquired title from defendants Nos. 2 to 4, who in their turn had obtained settlement from defendants Nos. 5 to 35, and that in spite of plaintiffs' protests, the Company defendants (defendant No. 1) did not stop working the mine. The plaintiffs therefore prayed for a declaration that the defendants had no right to the minerals in the disputed *mauza*, for possession of the underground mines, and for a perpetual injunction restraining defendant No. 1 from working the mines in the *mauza* or in any way dealing with the mineral rights thereof.

The main contentions of the several sets of defendants were that the *mauza* in dispute had been held by Ramdhan Misser and others and their predecessors-in-title from before the permanent settlement in *talabi* or *kheraji brahmottar*

(1) (1906) I. L. R. 33 Cal. 511.

(3) (1907) I. L. R. 34 Cal. 753.

(2) (1906) I. L. R. 34 Cal. 358.

(4) (1910) I. L. R. 37 Cal. 723;

I. R. 37 I. A. 136.

right as a permanent, hereditary and transferable tenure, the *mogoli* or rent payable for which had all along remained unchanged; and that as such *brahmottardars* and also by reasons of open, peaceful, undisturbed and uninterrupted possession of the surface and mineral rights of the *mauza*, for more than 12 years prior to the institution of the suit, the said Ram-dhan Misser and others and the defendants and their lessees through or under them were fully entitled to the surface as well as the mineral rights of the *mauza*.

The Subordinate Judge held that until the defendants' *talabi brahmottar* right was avoided in its entirety, the defendants Nos. 5 to 35 must be considered as rightful owners of the minerals. He accordingly dismissed the suit. The plaintiffs thereupon preferred this appeal in the High Court.

*Dr. Rash Behary Ghose* (with him *Babu Mahendranath Ray* and *Babu Lalit Mohan Ghose*), for the appellants. The main question is—'Assuming that there was a permanent tenure, are the defendants entitled as against the landlord to claim the minerals?'

The present appeal is concluded by the judgment of the Privy Council in *Hari Narayan Singh Deo Bahadur v. Sriram Chakravarti* (1). In this case, the High Court found that the tenure-holders had a permanent right: *Sriram Chakravarti v. Hari Narain Singh Deo* (2). It was conceded there that the defendants had a permanent right. Apart from that case, I submit that a tenant has no right to work mines which were not open at the time of the lease: see Transfer of Property Act, section 108, cl. (o).

The law in England is the same: *Clegg v. Rowland* (3). A mining lease is not a lease, it is a sale of the soil itself: *Campbell v. Wardlaw* (4). See Philip's Tagore Law Lectures (1st Edition) at pp. 47, 217, 222 and 322. The idea that the owner of the surface is entitled *ex jure naturæ* to every thing above or beneath it is essentially a modern idea: *Sarada*

(1) (1910) I. L. R. 37 Calc. 723;

L. R. 37 I. A. 136.

(2) (1905) I. L. R. 33 Calc. 54.

(3) (1866) 2 Eq. 160.

(4) (1883) 8 App. Cas. 641.

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Charan Mitra's Tagore Law Lectures, p. 394. Mr. Justice Pargiter, in the case above cited, thought that a permanent lease was a conveyance subject to a rent charge, and the zemindar had no reversion. But see *Kally Dass Ahiri v. Monmohini Dassee* (1). The last mentioned case was approved of by their Lordships of the Judicial Committee in *Abhiram Goswami v. Shyama Charan Nandi* (2). See also *Tituram Mukerji v. Cohen* (3), where the zemindar was held entitled to the mineral as against the *mudis* who were permanent tenure-holders. In the case of *Shyama Charan Nandi v. Abhiram Goswami* (4) and *Megh Lal Pandey v. Rajkumar Thakur* (5), the grants in favour of the lessees included all rights—'mai haq-haqq.'

The case of *Brojanath Bose v. Durga Prosad Singh* (6), follows the decision in *Sriram's case* (7). If *Sriram's case* is no longer law, my appeal is irresistible.

Mr. Justice Pargiter thought that a zemindar who reserved mineral rights would not be entitled to go on the land and work the mines without the consent of the lessees. But see *Rameswar Malia v. Ram Nath Bhattacharjee* (8), and *Gandoo Mahata v. Nilmonnee Singh Deo Bahadur* (9). See also Bainbridge on Mines, 5th Edition, 1900, p. 41.

A permanent tenant cannot make such excavations as to cause damage: *Girish Chandra Chando v. Sirish Chandra Das* (10). A tenant is always a tenant and never an owner of the land: *Mani Chander Chakerbutty v. Baikanta Nath Biswas* (11). See also *Bagdu Majhi v. Raja Sri Sri Durga Prosad Singha* (12), where it was held that a tenant, though he might acquire a permanent right by prescription, had no right to the minerals.

Then there is another view of the case. Coal was not known to have existed in that part of the country in the 18th

(1) (1897) I. L. R. 24 Calc. 440.

(2) (1909) I. L. R. 36 Calc. 1003.

(3) (1905) I. L. R. 33 Calc. 203.

(4) (1906) I. L. R. 33 Calc. 511.

(5) (1906) I. L. R. 34 Calc. 358.

(6) (1907) I. L. R. 34 Calc. 753.

(7) (1905) I. L. R. 33 Calc. 54.

(8) (1905) I. L. R. 33 Calc. 462.

(9) (1894) 1 C. L. J. 526.

(10) (1904) 9 C. W. N. 255.

(11) (1902) I. L. R. 29 Calc. 363.

(12) (1904) 9 C. W. N. 292.



century when these leases were granted. Neither the zemindar nor the lessees had any idea that they were dealing with coal. The Pachete Raj was an impartible *raj*, hence it was thought to be inalienable till recently. The rights of parties to a contract are to be judged by that law which they intended, or rather by which they may justly be presumed to have intended to bind themselves, notwithstanding a change in the law: *Abdul Aziz Khan v. Appayasami Naicker* (1).

The next question is—Was this a permanent tenure on a fixed rent? This question is immaterial if I succeed on the first point. The presumption under section 50 of the Bengal Tenancy Act does not apply, as it is not a proceeding under that Act. The onus is on the other side.

*Mr. B. Chakravarti* (with him *Mr. S. P. Sinha, Babu Umakali Mukherji and Babu Jaggopal Ghosh*), for the respondents. The rent has not changed. As for presumption, see *Nunda Lal Gossami v. Atarmoni Dassi* (2). The donor or settlor did not reserve any benefit. The tenure was described as *talabi* or *mogoli brahmottar*, which meant a gift subject only to a condition of payment of a quit-rent. The grant in question was permanent, transferable, heritable and was both of surface and subsoil. The case of *Hari Narayan Singh Des Bahadur v. Sriram Chakravarti* (3), is not a direct authority on the point in question. A case is an authority only for what it decides: *Quinn v. Leathem* (4). In *Hari Narayan Singh's case* (3), the Privy Council held that the defendants' tenure was not permanent. The decision in *Abhiram Goswami's case* (5), is no longer law: see *Ishwar Shyam Chand Jiu v. Ram Kanai Ghose* (6). *Kally Dass Ahiri's case* (7), deals with land in Calcutta. A permanent tenure escheats to the Crown on failure of heirs of the tenant, and not to the zemindar: *Sonet Kooer v. Himmut Bahadoor* (8).

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|---------------------------------------------------------|-------------------------------------------------------|
| (1) (1903) I. L. R. 27 Mad. 131;<br>L. R. 31 I. A. 1.   | (5) (1909) I. L. R. 36 Calc. 1003.                    |
| (2) (1908) 12 C. W. N. 432.                             | (6) (1911) I. L. R. 38 Calc. 526.                     |
| (3) (1910) I. L. R. 37 Calc. 723;<br>L. R. 37 I A. 136. | (7) (1897) I. L. R. 24 Calc. 440.                     |
| (4) [1901] A. C. 495.                                   | (8) (1876) I. L. R. 1 Calc. 391;<br>L. R. 3 I. A. 92. |

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I am a grantee and not a lessee. Section 108, cl. (o), applies in the absence of contract to the contrary or local usage.

The Pachete Raj is not alienable: *Anund Lal Sing Deo v. Maharaja Dhiraaj Garrood Narayan Deo Bahadur* (1).

It would be dangerous if the law laid down in *Hari Varayan Singh Deo Bahadur v. Sriram Chakravarti* (2), were to apply to permanent tenures. Then a *patnidar* will also not be entitled to deal with minerals.

*Dr. Rash Behary Ghose*, in reply. The defendants cannot claim a higher status than that of the defendant talukdars: see Regulation VIII of 1793, ss. 5 and 7.

The defendants, even if they hold a permanent tenure are not proprietors of the soil. They are mere lease-holders: see *Rajah Suttayanund Ghossal v. Hurro Kishore Dutt* (3); see also Smith's Landlord and Tenant p. 120.

*Cur. adv. vult*

COXE AND TEUNON JJ. The case for the plaintiff was that the village in suit was a *mal* village of his zemindari which was held by defendants 5 to 35 as ordinary tenants. They leased it to the defendants 2 to 4, who again leased it to the defendant 1, the Lachipur Coal Company. It was contended that the mineral rights did not belong to the tenants but remained in the plaintiff, and therefore this suit was brought, in which the relief claimed was, generally, that the plaintiff's rights to the minerals, etc., should be declared and that the defendants should be prevented from exercising any such rights. The defence is briefly that the village is a *mogoli brahmottar* village given to the predecessors of the defendants long before the permanent settlement and that the mineral rights belonged to the *brahmottardars*. The suit was dismissed by the learned Subordinate Judge and the plaintiff appeals.

The two principal points for decision are, *first*, whether the *brahmottardars* are at least permanent tenure-holders and,

(1) (1850) 5 Moo. I. A. 82.

(3) (1871) 15 W. R. 474.

(2) (1910) I. L. R. 37 Calc. 723;

L. R. 37 I. A. 136.

*secondly*, whether, if so, the mineral rights belong to them or to the Raja of Pachete, the plaintiff in the case.

The learned vakil for the appellant lays great stress on the evidence that the rent has varied. It cannot be disputed that the land was granted to the Brahmins before the permanent settlement. It seems to us to be of little importance whether there were originally three grants or one. If there was originally one grant, it was certainly divided into three before the memory of any of the witnesses. But this would not in any way affect the permanent character of the tenancies. The case of *Uday Chandra Karji v. Nripendra Narayan Bhup* (1), to which reference has been made, proceeded on the special wording of section 50 of the Tenancy Act and can have no application to a tenancy which had been divided long before that enactment. Nor is this a case to which section 50 can have any application. Nor do we think the fact that the Brahmins pleaded in certain rent suits that the rent had been split up, of any importance. The vital point for decision is whether a permanent tenure was given to the Brahmins and it makes little or no difference whether the whole village was originally given by one grant or lease, or by three.

The first piece of evidence on which the respondent relies to prove variation of the rent is Ex. I, filed by the defence. This was a statement filed by the then Raja in 1197 (1790-91) showing the villages and their jamas in his *chakla*. This showed 27 *mal*, 12 *talabi debattar*, 45 *talabi brahmottar* and some other villages. Against Panchgachia the village in suit, the jama is shown as Rs. 25-2. It is argued that this is the rental due to the Raja from the villagers. This argument is grounded on the facts that the Raja has only been able to recover Rs. 14-12 as rent from Nowdiha, a village appearing in Ex. I a little below Panchgachia with a jama of Rs. 14-12; and *secondly*, on a statement by one of the Brahmins, Ramdhan Misser, to the effect that as the Raja had filed the paper himself it must represent the actual rents of the village. It seems to us, however, that there can be no doubt that the

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*jama* mentioned is the revenue payable to Government. The appellant has by consent filed three other papers, a *goshwara* of 1201 (1794-95), filed by the Raja, a revenue sale proclamation of 1797 and a Civil Court sale proclamation of 1807. The first two show the *sadar jama*, that is to say, the Government revenue of Panchgachia to be Rs. 26-3-15; and clearly this could not be so if the rent receivable from the tenants was only Rs. 25-2. The rent of Rs. 14-12 decreed with respect to Nowdiha must probably be due to some mistake, while as to the statement of Ramdhan Misser, it is clear that his opinion as to what these papers show is quite valueless.

The three papers above referred to show, however, that the rents received by the Raja from the villages amounted in the case of Panchgachia to Rs. 39-3-10, and it is urged that this at any rate shows that the rent, which is now Rs. 60-14, has been altered. But we are unable to accept this argument. The statements relate to nearly 100 villages in *pargana* Shergarh, but, throughout, the *sadar jama* bears a steady proportion of two-thirds to the rental, with inconsiderable variations of a few annas. This shows beyond doubt that there is some definite relation between the figures of the two columns. And as the rental cannot possibly have been assessed according to the Government revenue it follows, either that the revenue was assessed on the rental, or that the column of the rental was filled up so as to correspond with the revenue without any regard for the actual facts. The first supposition is obviously the most probable and it follows that as the Government revenue, for which the Raja would be responsible, bore a direct proportion to the rental, the Raja had the strongest inducements to estimate the latter as low as possible. In these circumstances it seems to us impossible to hold that these statements by the Raja are conclusive evidence against the Brahmins, who had nothing to do with them, of the rent then payable by them. Another document on which reliance is placed is a *thoka*, said to be of 1218. This is a loose page of *zemindari* accounts, showing the rent due from the six-annas share which is said to be the share of Moniram Upadhyaya.

This document does not appear to us convincing. It purports to be signed at the top right-hand corner by Moniram. But the whole body of the document seems to be in the same handwriting, including an agreement by one Sobharam to pay a part of the rent due; though why the tenant should write his landlord's accounts is by no means apparent. There is no other evidence worthy of detailed consideration to show that the rent has varied.

It is, however, for the defendants to show that the rent has not varied, and their evidence on this point must be considered. Their case is that the tenure is divided into three parts, *viz.*, the seven-annas with a rental of Rs. 24-6, the six-annas with one of Rs. 31-8 and the three-annas with one of Rs. 5. As regards the rental of the six-annas they rely on a receipt of 1817, and another of 1825 which show the rent to be Rs. 29-9, a sum which would in the present coinage amount to Rs. 31-8-6. The first receipt may not be of much value, but the second seems to us a trustworthy document. It purports to be granted by a *Krok Sazawal*, that is to say, a revenue officer, in the position probably of a *nazir* or bailiff, placed in charge of an estate when it was under attachment or sequestration for default in payment of revenue. There are three witnesses and the appearance of the document is in its favour. The learned Subordinate Judge has accepted this document as trustworthy and, we think, rightly.

As regards the seven-annas' share, the defendants rely principally on an old judgment of 1808. This is a copy produced by the defendants which bears undecipherable seals and is dropping to pieces. It is argued that it is not shown to be a certified copy and that no attempt has been made to produce the original. It appears from the judgment in *Brojanath Bose v. Durga Prasad Singh* (1), that no old records of the District of Manbhum are extant and we do not think that the absence of the original is fatal. The Subordinate Judge did not believe that this document was forged, and we think he was right. The document shows that the rent of the seven-

(1) (1907) I. L. R. 34 Calc. 753, 775.

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annas was Rs. 22-8 sicca, or Rs. 24 in currency, that Rs. 26 had been paid and that the tenants of the seven-annas were entitled to a refund of Rs. 3-8. It is suggested that this document and Ex. K, above referred to, even if genuine, may be and probably were records of collusive transactions intended to create evidence. There is nothing, however, to show that the defendants were under any necessity to create evidence until more than half a century later.

As regards the three-annas share there is no old evidence on either side except the *thoka* of 1218 to which we have referred.

It can not be disputed that in 1879 the above rents of Rs. 24-6 and Rs. 31-8 and Rs. 5 were definitely raised in a suit between the parties and accepted by the Munsif, and that since then the same rents have been paid. That gives a period of 23 years before the cause of action in this suit during which the plaintiff has apparently been compelled to acquiesce in these rents. If he were now to bring a suit under the Tenancy Act for an enhancement of rent, section 50 of the Act would render it almost impossible for him to succeed. That section does not, of course, apply to a suit like the present, which is not under the Act, but the conduct of the plaintiff is allowing his right of enhancement under the Tenancy Act to be extinguished for all the practical purposes of that Act, justifies the inference that he knew that that supposed right had no real existence or in other words that the rent was fixed in perpetuity.

Although much evidence has been given, that described above, appears to us to be all that has much probative force on the question whether the rent has varied and on it, we feel no doubt that the rent has always been the same.

It is not disputed that the interest of the Brahmins has been transferable. They have dealt with it as their own and their transferees have been recognised by the landlord. This fact too is a strong indication that the tenures are permanent.

Taking these facts into consideration, namely, that the tenures are described as *mogoli brahmottar*, that they have existed since before the permanent settlement, that the rents



have always been the same and that the tenures are freely transferable, we have no doubt that the Brahmins were at least permanent tenure-holders. This being so the next question that arises is whether they are entitled to the mineral rights. It appears to be well settled in England that a tenant for life or for years has no right to work unopened mines: *Clegg v. Rowland* (1), *Campbell v. Wardlaw* (2); and this, despite the case of *Gordon, Stuart & Co. v. Tikaitnee Seobas Kowaree* (3), has been accepted as good law in India in *Prince Mahomed Buktyar Shah v. Rani Dhōjamani* (4). See also *Tituram Mukerjee v. Cohen* (5). The question remains whether the position of a tenant in perpetuity is any better in this respect than that of a tenant for life or for years. It was held in *Kally Dass Ahiri v. Monmohini Dassee* (6), that the landlord continues to have a reversion in the property and this was cited with approval in *Abhiram Goswami v. Shyama Charan Nandi* (7). Nor does the fact that the tenure would escheat to the Crown in default of heirs [*Sonet Kooer v. Himmud Bahadoor* (8)], really negative the supposition that such a reversion subsists. If this is so, it is difficult to see why there should be any difference in principle between the lessee for years and the lessee in perpetuity, when nothing is known or can be inferred about the intentions of the parties at the time of the inception of the lease. If the opening and working of new mines in the case of a lessee for years is waste, it would seem to be the same ultimately in the case of a lease in perpetuity, though the injury is more distant. In either case the tenant might destroy the whole subject of the tenancy so that when the landlord came to sell it for arrears of rent, he might find that there was nothing to sell. It has been argued that the effect of *Abhiram Goswami v. Shyama Charan Nandi* (7) has been weakened by the decision in *Ishwar*

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(3) (1864) W. R. 370.

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(8) (1876) I. L. R. 1 Cal. 391;

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*Shyam Chand Jiu v. Ram Kanai Ghose* (1), but the former case is still binding upon us. Reliance has been placed on the decisions in *Shama Charan Nandi v. Abhiram Goswami* (2), *Megh Lal Pandey v. Rajkumar Thakur* (3), and *Brojanath Bose v. Durga Prosad Singh* (4). The first case does not help the respondents much. It contains an observation, rather than a considered opinion, that a permanent lease, including "all rights of various kinds," would transfer minerals. There are no words of that kind here, and the decision was reversed on appeal though on other grounds. In the next case it was held that a permanent lease of land "*mai haq-haquq*" would transfer the minerals. This is much more in the respondents' favour, as the vague and general words "*mai haq-haquq*" add really but little to the effect of the lease. Still there is nothing here but a permanent tenure without those words or any words, and therefore, the case is not really a decisive authority. In the third case it was held that certain *digwars* were permanent tenants, and therefore were entitled to the mineral rights in the absence of express reservation. This case, no doubt, goes the whole length of the respondents' contention, but we are informed that it is under appeal. Moreover, the learned Judges relied principally on the decision in *Sriram Chakracarti v. Hari Narain Singh Deo Bahadur* (5), which has now been reversed on appeal to the Privy Council.

It has been urged that the Brahmins are more than tenure-holders, that they are absolute owners subject to a rent charge, that the transfer to them was not a lease but a gift burdened with a condition such as the Hindu law recognises. The distinction seems to us too fine to be appreciated. We know nothing as to what the intentions of the parties were at the inception of the tenancy. But in times within our knowledge they have been treated as tenants and sued for rent and cesses, and have apparently made no objection.

- (1) (1911) I. L. R. 38 Calc. 526.      (3) (1906) I. L. R. 34 Calc. 358.  
 (2) (1906) I. L. R. 33 Calc. 511.      (4) (1907) I. L. R. 34 Calc. 753.  
 (5) (1905) I. L. R. 33 Calc. 54.

\*A great deal of evidence has been given to show that other persons in the position of the defendants have been dealing with the mineral rights as their own, without apparently any objection by the Raja. This evidence is open to the obvious objection that we do not know exactly what the position of the executants of these sales and leases was. It may conceivably be the case that they had *sanads*, which showed that all the rights in the land had been transferred to them. Still, no doubt, this mass of evidence cannot be put aside so easily. It is not likely that many holders of *brahmottar* villages are in a better position than the defendants in this suit with regard to the possession of title deeds, while it does seem clear that many of them have been dealing freely with the underground rights, and some of the leases go back to 1860 and one to 1858. This undoubtedly gives the impression that the *brahmottardars* generally have been dealing with the underground rights. But it is impossible to base a definite conclusion on an impression of this nature. Even in Panchgachia, where the evidence of such transactions goes back in 1880, the Subordinate Judge finds that although the defendants from time to time gave leases to speculators in coal, the enforcement of the leases was too casual and intermittent to justify an inference of adverse possession with sufficient continuity and publicity. We do not know in how many other cases the state of affairs might be found to be the same, and it may be that in most of the villages covered by the leases, etc., it may still be open to the Raja to claim the underground rights. Accepting therefore the fact that the *brahmottardars* of the villages of the *zemindari* have been dealing with the mineral rights as their own for some time we do not think that in reality that fact greatly affects the question of law that we have to decide, namely, whether the holder of a permanent tenure, in the absence of all evidence of the terms of the lease, should be presumed to own the underground rights.

It appears from the evidence of Haradhan Sarkar that in 1877, the then Raja of Pachete bought the sub-soil rights in

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the village of Kuttarha from certain *mahararidars* under the holders of the village. The witness says that a quarter of the village was *mal* and three-quarters *bhattottars*. It is urged that *bhattottar* land stands in exactly the same position as *brahmottar land*, a *Bhat* being a species of Brahmin. It is argued therefore that this purchase amounts to an admission that the mineral rights belong to the Brahmin tenants. But here too we do not know if the Bhats had any *sanad* showing what had been leased to them. The village Kuttarha does not appear in the *goshwara* papers and the argument rests on the unproved assumption that every tenancy of a Brahmin in the Pachete Raj is necessarily of the same nature and extent. Moreover, the question whether permanent tenants without written leases are entitled to the minerals is a point of law quite doubtful enough to take all value out of the admission. Even if it be held that the minerals belonged to the Raja, he might very prudently have fortified himself by a purchase of whatever rights the tenants might have.

On the other hand it appears from Ex. I, that in 1858 the Bengal Coal Co., executed an agreement in favour of the Assistant Commissioner at Purulia agreeing to pay rent for their coal lands. Apparently the Pachete Estate had then come under the management of Government. This is evidence so far as it goes, that the landlord was also recognised as having the right to dispose of the minerals; and probably the fact is that the Coal Company thought it prudent to take settlement from both sides.

It has been faintly argued that the Pachete Raj is impartible and that at the time that these tenures were granted it was generally understood that an owner of an impartible estate could not alienate. But it is not proved that the estate is impartible [*Anund Lal Singh Deo v. Maharaja Dheraj Gurrood Narayun Deo Bahadur* (1)] and it is impossible to contest the alienations on that ground when it is clear that more than 50 villages in a single *pargana* were alienated in this

(1) (1850) 5 Moo. I. A. 82, 103.

way in the 18th Century, and the validity of the alienations has never been questioned.

It appears to us that the mineral rights must be regarded as the property of the Raja. The appeal will accordingly be allowed. The plaintiff will get a decree declaring his title to the mineral rights and for an injunction restraining the defendants from working mines in Panchgachia. He will be entitled to his costs of both Courts.

S. M.

*Appeal allowed.*

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## APPELLATE CIVIL.

*Before Mr. Justice Coxe and Mr. Justice Teunon.*

ZAMIL AHMED

r.

THE MAHARAJAH OF SIKKIM.\*

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*Political Agent at Sikkim, Court of—Execution of Decree—Transfer of Decree for Execution—Civil Procedure Code (Act XIV of 1882) s. 229 A; (Act V of 1908) ss. 43, 45.*

By the notifications of the 29th March, 1889, and 3rd October, 1907, the Governor-General in Council declared that s. 229A of the Code of Civil Procedure of 1882 (s. 45 of the Code of 1908) should apply to the Court of the Political Agent at Sikkim.

A decree obtained in the Court of the Political Agent at Sikkim and transferred for execution to a Court in British India, could therefore be executed within the jurisdiction of that Court.

APPEAL by the judgment-debtors, Zamil Ahmed and others.

On the 11th of January, 1909, the Maharajah of Sikkim obtained a decree for a certain sum of money against one Zamil Ahmed and others in the Court of the Political Agent at Sikkim. The decree-holder got the decree transferred for execution to the Court of the Subordinate Judge of Darjeeling

\* Appeal from Original Order, No. 231 of 1909, against the order of F. E. Piffard, Subordinate Judge of Darjeeling, dated March 29, 1909.

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through the District Judge of Purneah. On the 26th of March, 1909, the decree-holder by an application to the learned Subordinate Judge prayed that the decree might be executed by attachment of the property of the judgment-debtors mentioned in the application. The judgment-debtors objected to the application for execution on the ground, *inter alia*, that it not being shown that the Court of the Political Agent at Sikkim was a Court established or continued by the authority of the Governor-General in Council within the meaning of section 43 of the Code of Civil Procedure of 1908, the execution could not proceed.

It appeared that by notifications on the 29th March, 1889, and 3rd of October, 1907, the Governor-General in Council declared that section 229A of the Code of Civil Procedure of 1882 (now section 45 of the Code of 1908), should apply to the Court of the Political Agent at Sikkim.

The learned Subordinate Judge overruled the objection of the judgment-debtors, and allowed execution to proceed.

Against that decision the judgment-debtors appealed to the High Court.

*Babu Umakali Mukherjee* and *Babu Kulwant Sahai*, for the appellants.

*Babu Proras Chandra Mitter*, for the respondent.

COXE AND TEUNON JJ. In this case the respondent obtained a decree in the Court of the Political Agent at Sikkim. An application was made to execute this decree in the Court of the Subordinate Judge, Darjeeling. The appellant objected to the execution; but his objection was overruled, and hence this appeal.

The first and principal point taken on his behalf is that it is not shown that the Court of the Political Agent at Sikkim is a "Court established or continued by the authority of the Governor-General in Council," within the meaning of section 43 of the Code of Civil Procedure. It appears to us, however, that this objection cannot be sustained. By reference to



the notifications of the 29th March, 1889, and 3rd October, 1907, it appears that the Governor-General in Council declared that section 229A of the Code of Civil Procedure, now section 45, should apply to that Court. This appears to us to show beyond dispute that that Court is a Court established or continued by the authority of the Governor-General in Council, because it is only to such Courts that section 45 of the Code of Civil Procedure can be applied by the Governor-General in Council.

It has been argued that although the Court may be regarded as established or continued by the authority of the Governor-General in Council for the purposes of section 45, it is not necessarily such a Court for the purposes of section 43; but, in our opinion, this view cannot be upheld. If it is a Court established or continued by the authority of the Governor-General in Council, it is immaterial for what purposes it was so established or continued.

It has also been urged that it has not been shown that the decree could not be executed within the jurisdiction of the Court of the Political Agent at Sikkim.

This, however, is a pure question of fact; and, as it was not raised by the appellant before the Court below, we do not think that we should allow it to be raised now.

Accordingly, we dismiss the appeal with costs.

*Appeal dismissed.*

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## APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Cuspersz.

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v.

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*Guardian—Hindu Widow—Re-marriage—Guardians and Wards Act (VIII of 1890), s. 39—Whether a Hindu widow appointed guardian under the Act loses her right of guardianship on re-marriage—Hindu Widows' Re-marriage Act (XV of 1856), s. 3.*

A Hindu widow who has obtained a certificate of guardianship in respect of the person and property of her infant sons, does not, merely on her re-marriage, lose her right to act as guardian of the minors.

APPEAL on behalf of the petitioner, Ganga Pershad Sahu.

This appeal arose out of an application for the removal of a guardian. The applicant alleged that the opposite party Musammat Jhalo, widow of Mahabir Pershad deceased, obtained a certificate of guardianship of the person and property of her minor sons on the 5th of December, 1904; that on obtaining the certificate she married her *karpardaz*, one Too-noo Sahu in *sagai* form on the 29th May, 1909; that, regard being had to the provisions of section 3 of Act XV of 1856, she lost her right to remain as guardian of her minor sons, and that her interest had become adverse to the interest of her minor sons. The applicant who was the uncle of the minors, prayed under those circumstances that the widow might be removed from the guardianship of the minors, and that he be appointed in her place.

The objector, Musammat Jhalo, pleaded (*inter alia*) that by reason of re-marriage, which was sanctioned by the custom of the caste, she could not legally be deprived of the guardianship of the person and property of her minor sons; and that the provisions of section 3 of Act XV of 1856 did not apply

\* Appeal from order, No. 11 of 1910, against the order of C. W. F. Pittar, District Judge of Patna, dated Sept. 1, 1909.

to the case inasmuch as she was the certificated guardian of the minors before her re-marriage.

It appeared that two of the children were examined by the Court; one of these supported the application made by his uncle, while the other preferred to remain under the guardianship of his mother.

The learned District Judge having held that no ground was made out for the removal of the guardian, dismissed the application.

Against this decision the petitioner, Ganga Pershad Sahu, preferred an appeal to the High Court.

*Babu Naresh Chandra Sinha*, for the appellant. The question is, whether a Hindu widow by re-marriage loses her right to act as guardian of her infant sons by her former husband. I submit she does lose her right, regard being had to section 3 of the Hindu Widows' Re-marriage Act. The lower Court is wrong in holding that the Act does not apply in the present case inasmuch as re-marriage was customary amongst the class to which the widow belonged. In the case of *Rasul Jehan Begum v. Ram Surun Singh* (1), their Lordships said that "the rule of forfeiture in Act XV of 1856 speaks of the general principle of Hindu law; and that even when a second marriage is permitted by custom it entails forfeiture of all her interest in the first husband's estate." Under the Hindu law, a widow on re-marriage ceases to be the surviving half of her first husband: *Golap Chandra Sarkar's Hindu Law*, p. 144. The case of *Panchappa v. Sangambasawa* (2), supports my contention that by reason of the re-marriage a widow's rights and interests which she might have in her deceased husband's property ceased and determined as if she had then died. On the re-marriage the child by the former husband should ordinarily be considered as a child "who had neither father nor mother," in the sense of section 3 of Act XV of 1856: *Khushali v. Rani* (3). Ordinarily a widow ceases to be a guardian of a child by her former husband by

(1) (1895) I. L. R. 22 Cal. 589. (2) (1899) I. L. R. 24 Bom. 89.

(3) (1882) I. L. R. 4 All. 195.

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reason of re-marriage, unless she shows that she should remain as such: Mayne's Hindu Law, 7th edition, p. 274, where reference is made to *Baee Sheo v. Ruttonjee Nuthoo* (1).

*Babu Karunamoye Bose*, for the respondent. Here the question is, whether a guardian having been appointed under the Guardians and Wards Act, on her re-marriage, she should be removed from her guardianship under section 39 of the Guardians and Wards Act. Under section 3 of Act XV of 1856, she does not lose her right to be appointed guardian of her children by her former husband; she only loses her preferential right to be appointed as such, and she ranks as a stranger. The Act has no application to class of people amongst whom re-marriage is permitted by custom, and applies only to cases in which the validity of re-marriage of the widow is not recognised by the caste to which she belongs, and reliance has to be placed on the provisions of the Act to legalise it. If it be assumed that the Act applies to the facts of the present case, then upon a proper construction of section 3 of the Act, the Court has power to appoint as guardian the mother who has re-married. The Court is to see whether any ground has been made out for the removal of the guardian under section 39 of the Guardians and Wards Act. A mother remains a mother even after re-marriage, and when the Court has appointed her guardian she ought not to be removed unless a case is made out under section 39 of the Guardians and Wards Act. The cases cited by the other side, do not touch the point. The case of *Rasul Jehan Begum v. Ram Sarun Singh* (2) goes to show that a Hindu widow cannot have any interest adverse to her minor sons.

*Babu Naresh Chandra Sinha*, in reply.

*Cur. adv. vult.*

MOOKERJEE AND CASPERSZ JJ. This appeal is directed against an order by which the Court below has refused an application, under section 39 of the Guardians and Wards Act, 1890, for removal of the respondent, a Hindu lady, from

(1) (1851) Morris. Bom. S. D. 103. (2) (1895) I. L. R. 22 Cal. 589.



the guardianship of the person and property of her infant sons on the ground that she has re-married after the death of her first husband. The circumstances, under which the application was made, are not disputed. One Mahabir Pershad died about the year 1900. He left a widow, now respondent before us, and three infant sons by her. On the 5th December, 1904, the widow obtained a certificate of guardianship in respect of the person and property of her infant sons. On the 29th May, 1909, she married a second time in *sagai* form; it may be mentioned at this stage, that re-marriage in this form is recognised by the caste to which she belongs. On the 28th June, 1909, the appellant before us, who is the son of the paternal uncle of the father of the infants, applied to the Court for the removal of the widow from the office of guardian, on the ground that, in view of the provisions of section 3 of the Hindu Widows' Re-marriage Act of 1856, she had, upon her second marriage, forfeited her right to act as guardian of the person and property of her infant sons by her first husband. The application was opposed by the widow, and it was contended that, in spite of her second marriage, she was a fit and proper person to continue as guardian of her minor children. Two of the children were examined by the Court: one of these supported the application made by his uncle, while the other distinctly stated his preference for his mother. The learned District Judge held that no ground had been made out for the removal of the guardian, and dismissed the application.

The uncle of the infants who was petitioner in the Court below, has now appealed to this Court, and on his behalf the decision of the District Judge has been assailed broadly on the ground that, under section 3 of Act XV of 1856, the mother of the infants ceased to be their guardian immediately upon her marriage, and that, in any event, it would not be to the interest of the minors that they should continue to live under the guardianship of their mother after she had taken a second husband. In answer to this contention, it has been argued that the Hindu Widows' Re-marriage Act of 1856 has

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no application by reason of two circumstances, namely, *first*, that it applies only to cases where the re-marriage of the widow would have been invalid but for the provisions of the Act; and, *secondly*, that section 3 of Act XV of 1856, even if it be held to be applicable, governs only cases of first appointment of a guardian, and not cases where, as here, a mother appointed guardian during her widowhood is sought to be removed on the ground of her re-marriage. It has further been contended that if re-marriage does not operate as a ground of forfeiture of the office of guardian, and if the matter is in the discretion of the Court, no grounds have been established for the interference of the Court. The question raised is one of considerable importance and apparently of first impression in so far, at any rate, as this Court is concerned.

There is no controversy in the case before us that the respondent was properly appointed guardian of the person and property of her infant children when the order was made in her favour in 1904, under section 7 of the Guardians and Wards Act of 1890. Section 39 of that Act specifies the grounds for the removal of a guardian appointed by the Court. The first nine grounds mentioned in the section have obviously no application to the circumstances of this case. The tenth ground, upon which the application of the appellant is apparently based, provides that the Court may, on the application of any person interested, or of its own motion, remove a guardian appointed by the Court by reason of the guardianship of the guardian ceasing or being liable to cease under the law to which the minor is subject. In the present case, the minors are subject to Hindu Law, and the question therefore arises whether under that law the guardianship of their mother ceases or is liable to cease upon her re-marriage. Our attention has not been drawn to any text of Hindu Law, which would support an affirmative answer to this question. Jagannath in his Digest (translated by Colebrooke, vol. IV, 1798, pages 242-44, texts 449-53) deals with the question of the protection of the property of infants. He



first quotes a text of Manu to the effect that the King should guard the property, which descends to an infant by inheritance until he returns from the house of his preceptor or until he has passed his minority. To this is added an explanation from the Ratnacara, that wealth, which descends to an infant by inheritance and becomes the property of the minor, let the King guard, that is, let him protect it from the other heirs. The learned author adds his own comment that the King may commit the share of the minor in trust to anyone co-heir or other guardian. The texts subsequently quoted from Vishnu, Sancha and Lichita tend to the same conclusion, namely, that the King should guard the property of an infant, and protect it, as he is incapable from non-age of conducting his own affairs. Jagannath then comments on a text of Baudhayana that, in respect of shares of infants, the King must himself, or through some person appointed by him, keep the share of the minor: the expenses and other matters should be superintended by the King himself or by a person appointed by him: the property of a minor should be entrusted to heirs and the rest appointed with his concurrence, or, if the infant be absolutely incapable of discretion with the consent of a near and unimpeachable friend, such as his mother and the rest: to which the learned author adds that, according to Katyayana kinsmen must guard the property of an infant. In the comments on text 453, Jagannath adds that in practice a mother is guardian of a minor and of his property; but he seems to hold that she may not always be skilled in the conduct of affairs, in which case the King, as the universal superintendent, may arrange to guard the property by every possible means. The substance of this discussion, treated as authoritative in *Kristo Kissor Neoghy v. Kader Moye* (1), which was accepted as good law in *Bhikuo Koer v. Chamela Koer* (2), points to the conclusion, that the King, as the ultimate protector of the State, may give suitable directions for the protection of the estate of infants, and that the test to be applied is to determine what course is bene-

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(1) (1878) 2 C. L. R. 583.

(2) (1897) 2 C. W. N. 191.

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ncial to the infant concerned. It cannot, therefore, be affirmed as an inflexible rule of Hindu Law, that a mother, upon her re-marriage, is disqualified to act as guardian of the person and property of her infant sons: indeed, the texts of Manu (IX 146, 190, 191) may militate against any such rule.

Reliance, however, has been placed by the learned vakil for the appellant upon the case of *Bacc Sheo v. Ruttonjee Nuthoo* (1), as an authority for the proposition, that a Hindu mother loses her right to act as guardian of her children by reason of her re-marriage. The case mentioned, however, is not an authority for any such comprehensive proposition. In that case, upon the re-marriage of a Hindu widow by name Sheo, Ruttonjee Nuthoo, the grandfather of her child, commenced an action for possession of the child on the ground that as she had contracted a second marriage, by the custom of the caste, the plaintiff as the paternal grandfather, had a right to the child. In so far as we can gather from the meagre statement in the report, it was not contested by the widow that there was such a custom; but she resisted the claim on the ground that, so long as the infant was at the breast, the mother had the best right to it. The Court of first instance dismissed the suit, as the Sastri of the Surat Adalat declared the plea of the mother to be good in law. On appeal the Zilla Judge found that the decision was opposed to the rules of the caste, and that as the mother at the time of the original trial was seven months gone with child, the plea set up in defence, which alone, according to the exposition of the Sastri, constituted her right to retain possession of the child, no longer held good. The decree of the original Court was, therefore, reversed and the possession of the child awarded to the grandfather. The mother of the child then appealed to the Bombay Sudder Court, and a Full Bench (Warden, Grant and Larken, JJ.), held, that the view of the Zilla Judge was correct; and that the pregnancy of the mother by a second marriage had divested her of the right she would otherwise have to the charge of a child of tender years by a

first marriage. It is manifest, therefore, that this decision was founded on the custom of the caste to which the widow belonged. It was alleged by her father-in-law, and not disputed by her, that according to such custom she had forfeited her right to the guardianship of her son as soon as she contracted a second marriage. The case cannot consequently be treated as an authority for the broad proposition that a Hindu mother loses her right of guardianship of her infant children by a second marriage. It may be added that the case of *Muhtaboo v. Gunesh Lal* (1), where a mother was superseded from the office of guardian by reason of loss of caste, can have no application in view of the provisions of the Hindu Widows' Re-marriage Act, 1856.

It has next been argued by the learned vakil for the appellant that by section 3 of Act XV of 1856, a Hindu widow on her re-marriage, loses the right of guardianship of her children by her deceased husband. That section provides as follows:—

“On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband, the guardian of his children, the father or paternal grandfather or the mother or paternal grandmother of the deceased husband, or any male relative of the deceased husband, may petition the highest Court, having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court if it shall think fit to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children or of any of them during their minority in the place of their mother and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother: Provided that, when the said children have not pro-

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(1) (1854) Beng. S. D. A. 329.

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perty of their own, sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors."

The learned vakil for the respondent has argued, that the application of this section to the case before us is excluded by reason of two circumstances, namely, *first*, that the section applies only to cases of first appointment of a guardian of an infant, and *secondly*, that it applies only to cases in which the validity of re-marriage of a widow is not recognised by the caste to which she belongs, and reliance has to be placed upon the provisions of the Act to legalise it. He has further contended, that upon a true construction of the section itself, even if it be assumed to be applicable, the Court is competent to appoint the mother, who has re-married, as guardian of her infant children, not in her capacity as mother, but as a person otherwise suitable for the purpose. In so far as the first reason assigned by the learned vakil for the respondent for exclusion of the application of the section is concerned, we are not impressed by it as well founded. It is an elementary principle, that if a person is appointed guardian of an infant, and events subsequently happen which, if they had existed at the time of the original appointment, would have been sufficient to disqualify him from appointment as guardian, such disqualifying circumstances, when they come into existence, justify the removal of the guardian. This principle is recognised by Domat in his Treatise on Civil Laws (Ed. Cushing, vol. I, paras. 1380 and 1397). In so far, however, as the second reason urged by the learned vakil for the respondent with a view to exclude the operation of section 3, is concerned, it is in our opinion, more substantial. The view was maintained by Sir Charles Sargent, C.J., in *Parekh Ranchor v. Bai Vakhat* (1), that the provisions of section 3 of Act XV of 1856 have no application to a case where the widow belongs to a caste in which re-marriage is permitted.



in other words, as the object of the Statute was to enable widows, who were unable to marry previously, to re-marry, the Statute ought to be considered as a whole, and such of its provisions as impose a disability ought not to be applied to cases where it is needless for the parties to seek the benefit of the provisions which recognise the right of a widow to re-marry. In this view, section 3 would have no application to the case before us. But it is worthy of note that this doctrine may, and has been carried too far. As was pointed out by this Court in the case of *Nitya Madhab v. Srinath Chandra* (1), the principle of which we recognise as well founded, the learned Judges of the Allahabad High Court in *Khuddo v. Durga Prasad* (2), *Ranjit v. Radha Rani* (3), *Harsaran v. Nandi* (4), and *Dharam v. Nand Lal* (5), appear to have held that because section 2 of Act XV of 1856 did not apply to a case in which the re-marriage of a widow was recognised by the caste, it followed that the interest of the widow in the estate of her husband did not cease on such re-marriage. It seems to have been overlooked, however, that although section 2 might not apply, the same result might follow from an application of the fundamental rules of Hindu Law, as pointed out in the case of *Matungini Gupta v. Ram Rutton Roy* (6), *Murugayi v. Viramakali* (7), *Rusul Jehan Begum v. Ram Surun Singh* (8), *Vithu v. Govinda* (9), and *Panchappa v. Sangambasawa* (10). In fact in such cases, as was clearly recognised in *Putla Bai v. Mahadu* (11), two questions arise for consideration, namely, *first*, whether the provisions of the Statute apply; and, *secondly*, if they do not, what is the effect of the application of the general principles of Hindu Law? This latter standpoint appears to have been overlooked by the learned Judges of the Allahabad High Court in the four cases just mentioned, as was plainly indicated by Mr. Justice

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(1) (1907) 8 C. L. J. 542.

(2) (1906) I. L. R. 29 All. 122.

(3) (1898) I. L. R. 20 All. 476.

(4) (1889) I. L. R. 11 All. 330.

(5) (1889) 9 All. W. N. 78.

(6) (1891) I. L. R. 19 Calc. 289.

(7) (1877) I. L. R. 1 Mad. 226.

(8) (1895) I. L. R. 22 Calc. 589.

(9) (1896) I. L. R. 22 Bom. 321.

(10) (1899) I. L. 24 Bom. 89.

(11) (1908) I. L. R. 33 Bom. 107.

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Banerji in *Gajadhar v. Kaunsilla* (1). Consequently, in the case before us, if we adopt the view taken by Sir Charles Sargent, section 3 has no application, because it is not disputed that the widow belongs to a caste in which re-marriage is recognised as valid by custom. Apart from this ground, however, we are decidedly of opinion that the second contention of the learned vakil for the respondent is well founded, namely, that upon a true interpretation of section 3, the Court is not bound to remove the mother, who has been previously appointed guardian, from her office merely by reason of her re-marriage. That section, no doubt, provides that it shall be lawful for the Court upon such re-marriage to appoint some proper person to be guardian of the children in the place of the mother: and that in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother. The law clearly contemplates that the widow upon re-marriage ceases to be the widow of her first husband. She consequently loses her preferential right to act as guardian of her children by her first marriage. But although such re-marriage is equivalent to a civil death in respect of her first husband and his children by her so far as their guardianship is concerned, she is not physically dead. This is manifest from the proviso to section 3, which contemplates that when the children have not property of their own sufficient for their support and proper education, no guardian shall be appointed otherwise than with the consent of the mother, unless the proposed guardian gives security. It has even been held (see section 5) that such a re-married widow may succeed to the estate of her son by her former marriage: *Akora Suth v. Boreani* (2), *Chamar Haru Dalmel v. Kashi* (3), *Basappa v. Rayava* (4). To put the matter briefly, the legislature recognises that such re-marriage not only does not operate as a physical death of the widow, but it does not operate even as a civil death for all purposes. Under such

(1) (1908) I. L. R. 31 All. 161.

(3) (1902) I. L. R. 26 Bom. 388.

(2) (1888) 2 B. L. R. 199;

(4) (1904) I. L. R. 29 Bom. 91.



circumstances it is impossible for us to hold that the Court may not appoint the mother as guardian of her children by her first marriage notwithstanding the provisions of section 3 of the Hindu Widows' Re-marriage Act. The only effect of the section is that the preferential right to the appointment she would otherwise have [Macnaghten's Considerations on Hindu Law, p. 25; Macnaghten on Hindu Law, vol. I, p. 103; *Oorahee Kowur v. Rajbunsee* (1)], is destroyed, and if she is appointed, she must be appointed as a stranger [*Khushali v. Rani* (2)]; in other words, the Court has a discretion in the matter, though ordinarily, unless good cause were shown to the contrary, the Court would appoint a relation as guardian under section 3 in place of the mother.

The question, which has been argued before us, has, it may be observed, been raised and decided in England. Under the law as it stood, before the Guardianship of Infants Act, 1886, it appears to have been repeatedly held that the second marriage of a widow does not operate as a necessary supersession from the guardianship of her infant children by her first marriage: *Villareal v. Mellish* (3). In the case of *In re Gornall* (4), the practice of the Court was stated to be upon the re-marriage of the widow, to direct a reference for the appointment of a new guardian and, under such reference, to continue her as guardian or re-appoint her with others: *Anonymous* (5), *Jones v. Powell* (6), *Pottinger v. Wightman* (7). The matter in England is, as we have stated, now regulated by a Statute, and in *X. v. Y.* (8), it was ruled, by the Court of Appeal, that the mere fact of the second marriage of the mother to a husband of a different faith from that of the father of her children, was not a ground for interference by the Court for the purpose of adding a co-guardian with her. It is manifest, therefore, that in England, there is no inflexible rule that a mother, upon re-marriage, must neces-

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(1) (1847) Beng. S. D. A. 557.

(2) (1882) I. L. R. 4 All. 195.

(3) (1737) 2 Swans. 533.

(4) (1839) 1 Beav. 347.

(5) (1837) 8 Simon 346.

(6) (1846) 9 Beav. 345.

(7) (1817) 3 Mer. 67.

(8) [1899] 1 Ch. 526.

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sarily be removed from the office of guardian of her infant children.

A similar view has been maintained in the American Courts, and it has been ruled that a woman may be appointed guardian of the person and property of her child by first marriage although she has married again and lives with her husband: *In re Hermance* (1). In Louisiana, on the other hand, the re-married mother is allowed to act as guardian, only if the Court is advised of her fitness by what is called a family meeting: *Robins v. Weeks* (2), *In re Mossy* (3), *Jewell v. Deblanc* (4), *Gauded v. Gauded* (5). We do not refer to these English or American cases as furnishing in any way authorities binding upon this Court in the decision of the matter, which must be determined on principles recognised by Hindu Law, under which system the conception of the marriage relationship is fundamentally different from what prevails in other systems of jurisprudence; but these cases serve to indicate that there is no foundation for the suggestion, made by the learned vakil for the appellant, that the view taken by the Court below is manifestly unreasonable. It is also worthy of note, as pointed out by Domat (vol. I, section 1378), that, although under the Civil Law, women could not be guardians they could be so to their own children. Mothers and grandmothers were qualified, because the authority which nature gives them over their children, and the affection which they have for their interest exempt them from the rule which excludes women from guardianship: and as the mother was capable of being guardian, the guardianship might be likewise committed to her second husband, who is described as the father-in-law to the minors: (see also Salkowski on Roman Private Law, p. 302).

On a review, then, of the principles and authorities we have examined, the position may be summed up as follows: There is nothing in Hindu Law to make it obligatory upon

(1) (1884) 2 Dem. Sur. 1.  
 (2) (1827) 5 Martin N. S. 379.  
 (3) (1843) 3 Robinson 390.

(4) (1903) 110 La. 810;  
 34 Southern 787.  
 (5) (1859) 14 La. 112.

the Court to remove the mother from the office of guardian of her infant children, merely because she has re-married: there is also nothing in the statutory provisions on the subject which compel the Court to direct her removal under similar circumstances; while, the fact that, in spite of her re-marriage, she is allowed to continue to act as guardian according to other civilised systems of jurisprudence plainly indicate that the appointment is not so contrary to dictates of humanity or principles of universal justice as the learned vakil for the appellant contended. In fact, in many instances, the inflexible rule suggested by the learned vakil for the appellant, if adopted, might lead to the serious injury of an infant of tender years. We must hold, therefore, that although the Court has a discretion to remove a Hindu mother from the office of guardian of the children of her first marriage, when she has re-married, the exercise of such discretion must be regulated from the point of view of the welfare of the infant concerned. In the case before us, upon the facts disclosed in the evidence, there is no room for controversy as to the manner in which this discretion ought to be exercised. The first child has, no doubt, indicated his preference for his uncle; the second, however, has pronounced clearly in favour of the mother. The first child is stated to be half-witted, and there can be no doubt that the appellant has done his best to cause estrangement between the mother and the son. The charges of neglect have been proved to be wholly groundless. The learned District Judge therefore, rightly refused to remove the mother from the office of guardian.

The result is, that the order of the Court below is affirmed and this appeal is dismissed with costs.

*Appeal dismissed.*

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## CRIMINAL REVISION.

*Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.*

1911

May 26.

KAMINI MOHAN DAS GUPTA

v.

HARENDRA KUMAR SARKAR.\*

*Prohibitory order—Excavation of a tank—Injury to adjoining house—Likelihood of a breach of the peace—Order passed on personal apprehension of the Magistrate without evidence taken or urgency recorded—Criminal Procedure Code (Act V of 1898) s. 144.*

The petitioner excavated a tank on his own land, adjoining the house of the opposite party, and the latter objected to the excavation on the ground that his house would be thereby rendered unsafe. No likelihood of a breach of the peace appeared from the police report or the written statements of the parties, but the Magistrate made the order under s. 144 of the Criminal Procedure Code without inquiry or recording any urgency:

*Held*, that the order was illegal, and that s. 144 was not applicable without inquiry or recording any urgency.

THE petitioner, Kamini Mohan Das Gupta, and the opposite party, Harendra Kumar Sarkar, were pleaders practising in the Civil Courts at Magura in the district of Jessore. In February 1911 the former commenced to excavate a tank on his own land about 10 feet from his residential house. The latter, who had a house about the same distance from the western bank of the tank, objected to the excavation on the ground that it would render his house unsafe. On the 6th April 1911, the Sub-Inspector of police of Magura inspected the locality, and submitted a report to the Sub-Divisional Magistrate of Magura stating that the parties were "contesting regarding the excavation of a tank," and that, "if the tank is excavated, then sooner or later the house of the first party (Harendra Kumar), which is adjacent to it, will go down to its bed." He prayed that action under s. 133 of

\* Criminal Revision, No. 497 of 1911, against the order of A. L. Gupta, Subdivisional Magistrate of Magura, dated April 19, 1911.



the Criminal Procedure Code might be taken. Upon the receipt of the report the Sub-Divisional Magistrate passed an order calling upon the petitioner and the opposite party "to show cause, on the 10th April, why an order under s. 144 of the Code should not be passed requiring the former to abstain from either the excavation of the tank or the exercise of any right over the disputed portion of the land."

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Notice was issued on the petitioner on the same day in the following terms:—

Whereas it has been reported to me that a quarrel has arisen between you and Harendra Kumar Sarkar, owing to the excavation of a tank by you on the western side of your house, and as there is a likelihood of a breach of the peace regarding the land on the western bank of the tank, you are required to appear before this Court, on the 10th April, to show cause why an injunction under s. 144, Cr. P. C. should not issue against you.

Notice was also issued on the opposite party to the following effect:—

As there is a police report that there is a likelihood of a breach of the peace with Kamini Babu on account of his excavating a tank on the eastern boundary of your house, you are required to show cause why an order under s. 144 should not be passed.

The parties filed their written statements on the 10th April. The petitioner alleged that he had done nothing to cause a likelihood of a breach of the peace; that the land on which the tank was being excavated, including the western bank, was his own; that he had no quarrel with the opposite party regarding the land, of which he was in undisputed possession; that the tank would not injure the house of the opposite party, and that there was no likelihood of a breach of the peace with respect to the excavation of the tank. Harendra Kumar in his written statement submitted that the excavation would bring his house down; that there had been as yet no settlement of the boundary line between their lands; that if the petitioner was allowed to excavate further, he (Harendra) would have great difficulty in proving the boundary line; and that immense loss would be caused to him. On the 11th April the Magistrate, after perusing the written statements, made the following order: "Unless the parties

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compromise their dispute by the 19th instant the rule will be made absolute." Neither party appeared on the 19th nor was any evidence recorded but the Magistrate passed an order in these terms:—

Nobody applies for further time. The rule is made absolute. Ordered under s. 144 Cr. P. C. that, whereas I am satisfied that there are grounds to apprehend a breach of the peace, in connection with a dispute that exists between Kamini Mohan and Harendra Kumar, in connection with some land between their homesteads, no party shall exercise any right of possession on the western bank and slope of the tank excavated between their homesteads. Further excavation of the said tank on the said side is hereby forbidden.

The Magistrate submitted in his explanation to the High Court that from his personal knowledge, his local inspection and his interview with the parties, he was satisfied that there was a likelihood of a breach of the peace between them, and that he had, therefore, taken action under s. 144, instead of s. 133 of the Code, as recommended by the police.

*Mr. H. N. Sen and Babu Trailakya Nath Ghose*, for the petitioner.

No one appeared to show cause.

CASPERSZ AND SHARFUDDIN JJ. We are asked in this Rule to set aside an order of the Sub-Divisional Magistrate of Magura, purporting to be under section 144 of the Criminal Procedure Code, on two grounds, namely, *first*, that the terms of section 144 of the Criminal Procedure Code were not duly complied with, and, *secondly*, that there is no probability of a breach of the peace.

The facts of the case are sufficiently trivial. They appear to be these. The parties are pleaders at Magura. The petitioner began to excavate a tank near his house, and the police apprehending that, if he continued to do so, the house of the opposite party would sooner or later go down into the bed of the tank, approached the Magistrate to take action under section 133. The Magistrate appears to have had an interview with the pleaders, and to have advised them to compromise. Then, on the 19th April 1911, and without



further enquiry and without recording any urgency in the matter, the Magistrate made his Rule absolute not on the ground reported by the police but, as appears from his present explanation, from his personal apprehension that the parties would break the public peace.

It appears to us that the order is entirely misconceived, and it cannot possibly be sustained. No cause is shown, but we have examined the papers and read the explanation of the Sub-Divisional Magistrate. It is obvious from a bare recital of the facts that section 144 of the Criminal Procedure Code was not applicable, and that the order was not passed on any real apprehension properly arrived at. Orders under section 144 are not intended for the purpose to which the Magistrate has applied his powers under that section. The section is ordinarily to be used in cases of urgency, and should not be allowed to take the place of any other provision of the law which might more appropriately apply. If the opposite party had been so advised, he might have obtained against the petitioner an injunction to prevent him from continuing the excavation of the tank. In this view, we make the Rule absolute, and set aside the order complained of.

E. H. M.

*Rule absolute.*

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## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and  
Mr. Justice Woodroffe.*

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June 23.

GOLAP JAN

v.

BHOLANATH KHETTRY.\*

*Malicious Prosecution—Action on the case—Cause of action—Complaint  
laid, but no process issued—Criminal Procedure Code (Act V of  
1898) ss. 202, 203—Defamation—Privilege.*

Where a complaint had been laid before a Magistrate by the defendant against the plaintiff for criminal breach of trust, and the Magistrate had referred the matter to the Police under section 202 of the Criminal Procedure Code, for enquiry and report and finally dismissed the complaint under section 203 of the Criminal Procedure Code, without issuing process:—

*Held*, that the prosecution had not commenced, and no suit for malicious prosecution was maintainable.

*Yates v. The Queen* (1) and *Clarke v. Postan* (2) referred to.

Nor would there lie any action on the case analogous to malicious prosecution.

*Held*, further, that the complaint, even if defamatory, was absolutely privileged.

APPEAL by Golap Jan, the plaintiff, from the judgment of Pugh J.

This appeal arose out of a suit for malicious prosecution, the main issue being whether the criminal proceedings had reached the stage when a "prosecution" could be said to have commenced. Failing a suit for malicious prosecution it was contended the plaintiff was entitled to relief, inasmuch as he disclosed injury and damage resulting from the wrongful conduct of the defendant.

It appears that Golap Jan and Bholanath Khettry joined in a venture to conduct a wrestling entertainment for profit, the former being entitled to a ten-annas' share, and the lat-

\*Appeal from Original Civil, No. 71 of 1910.

(1) (1885) L. R. 14 Q. B. D. 648. (2) (1834) 6 C. & P. 423.

ter to a six-annas' share of the profits. The duty of the former was to procure wrestlers, and that of the latter, to finance the undertaking, and to have charge of all moneys in connection therewith.

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It was alleged in the plaint that the undertaking yielded a profit of Rs. 30,000, that on the 25th March, 1909, the plaintiff caused a letter of demand to be written to the defendant claiming a proportionate share, and that on the 29th March, 1909, Bholanath laid a false complaint against him before the Chief Presidency Magistrate, charging him with criminal breach of trust in respect of three sums of money aggregating Rs. 1,700, and that on the 15th April, 1909, the defendant was examined by the Magistrate and his complaint dismissed. The plaintiff charged the defendant with having acted maliciously and without reasonable and probable cause, and alleged that he had been injured in his reputation and incurred certain expenses in defending himself. He assessed his damage at Rs. 10,000.

In his written statement, the defendant denied that any profit had accrued, and alleged that the undertaking had resulted in a loss of Rs. 12,000, towards which the plaintiff had failed to contribute. He denied that the complaint was false or that he had acted maliciously or without reasonable or probable cause, and alleged he was acting *bona fide* and with the object of protecting his own interests. It was further alleged that the complaint was dismissed by the Magistrate, on the ground that the dispute between the parties was of a civil nature, and damage to the defendant was denied. The defendant finally submitted that the complaint and examination did not amount to a prosecution and that the plaint disclosed no cause of action.

Pugh J., before whom the suit came on for hearing in the Court of first instance, refers to what occurred in the Police Court as follows :—

“What is alleged to have occurred in the Police Court was this: On an application to the Presidency Magistrate he, following a practice very common in the Police Court founded on section 202 of the Criminal Procedure Code, referred the matter to the Police for en-

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quiry. An enquiry was held and as the result of that enquiry the Magistrate after hearing the report refused to issue process on the ground that the case was a civil one."

The complaint was dismissed by the Magistrate under section 203 of the Criminal Procedure Code.

In the Court of first instance, it was desired by both parties that judgment should be given on the issue whether the action was maintainable, without any evidence being offered, and Pugh J., in his judgment, made the following reference to this procedure:—

"I have given the parties an opportunity of placing their evidence before the Court with a view to enable the Appeal Court to deal with the whole matter, but both parties agree that this course would not be a convenient one for them. A considerable amount of evidence might be taken which would be wasted and both parties are desirous that I should simply give my judgment at this stage without taking any evidence on the point raised. If the matter goes to the Court of Appeal, and my judgment is corrected the case will come back and evidence can then be brought forward. Having regard to the circumstances it seems that this course will be the one most convenient for all parties, and as both parties desire that evidence should not be offered, I see no objection to that course."

On the 18th July, 1910, Pugh J., dismissed the suit. After reciting the facts, his Lordship continued:—

"By Mr. Chaudhury, it is argued that a prosecution under the Criminal Procedure Code commences when the complaint is filed. In support of that contention he has in his favour two decisions of the Bombay High Court. On the other hand Fletcher, J. has held following *Yates v. Queen* (1), that the prosecution does not commence till process is issued. *De Rozario v. Golab Chand Aundjee* (2). The Bombay decisions are both of them to some extent *obiter dicta*, *Imperatrix v. Lakshman Sakharam, Vaman Havi and Balaji Krishna* (3), being in connection with a criminal prosecution and involving a discussion as to the sanction necessary before prosecution could take place. In the later Bombay case, *Ahmedbhai v. Framji Edulji* (4), it is stated in the judgment that a prosecution commences from the filing of the complaint and an action for malicious prosecution will lie even if the Court does not entertain the complaint. But though there is this statement in the judgment in fact that Court had entertained the complaint and proceeded with regard to some at any rate, of the charges. I am asked in this state of the authorities to dissent from Fletcher, J.'s decision and concur with that of the Bombay Court. In a case of this

(1) (1885) L. R. 14 Q. B. D. 648. (3) (1877) I. L. R. 2 Bom. 481, 487.  
 (2) (1910) I. L. R. 37 Calc. 358. (4) (1903) I. L. R. 28 Bom. 226.



kind where the matter has been recently decided by a Judge sitting on the Original Side I do not think it is for me to go further into the matter. There is no doubt some force in what Mr. Chowdhury says that if a complaint is lodged and a police enquiry directed under Section 202 of the Criminal Procedure Code there is to all intents and purposes, or may be, a trial before the Police Officer or Inspector. He points out that in this particular case evidence was given. An attorney appeared and witnesses were examined and one knows that as a matter of fact in these cases of Police enquiries people are often put to a considerable amount of trouble and no little expense for which they have some claim to be compensated if the complaint is groundless and malicious. On the other hand an action for malicious prosecution is, if I may so describe it, an imported action from English Law and it is recognised that by that action a man has certain remedies by way of a suit for malicious prosecution provided his adversary has succeeded in initiating a prosecution against him by getting a Magistrate to issue process but not otherwise. It is stated in Addition on Torts that the proceedings commence when the complaint is filed but this as pointed out by Fletcher, J. is not correct on the English authorities. It may be that there is a wrong for which a party has a remedy if process is actually issued against him. It may be on the other hand that he is without remedy and suffers no wrong provided a man simply lodges a complaint against him before a Magistrate on which no action is taken.

This may be one of the things which though unpleasant and possibly expensive is a *damnum sine injuria* such as accidental injury. It may be that the law considers the Magistrate is a sufficient protection and that the complainant is only liable if he in effect misleads the Magistrate not otherwise.

The point is not certainly so clear in favour of Mr. Chowdhury's present contention that I feel myself in any way called upon to express an opinion one way or the other. If the matter was *res integra* and to be dealt with on first principles it would be an arguable question with a good deal to be said on both sides as to whether in India an action of malicious prosecution or an action analogous thereto ought not to be under the circumstances of this case and that before Fletcher, J. But the question having once been decided on the Original Side of this Court in my opinion the only place where the matter can be properly further agitated is the Court of Appeal.

From this judgment the plaintiff appealed.

*Mr. S. P. Sinha* (*Mr. A. N. Chaudhuri* with him), for the appellant. The gist of the action for malicious prosecution is setting the criminal law in motion without reasonable and probable cause, and does not contemplate the issue of process. The object is that a person who is put in risk of loss of liberty or reputation, should have a remedy. Prosecution com-

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[WOODROFFE J. If there is a prosecution the commencement is the laying of the complaint: but it does not follow, that that would be the commencement if the prosecution falls through.]

It was pointed out by Wilson J. in *Karim Buksh v. Queen-Empress* (5) that in this country a prosecution may commence in one of two ways, viz., under section 154 or section 191 of the Criminal Procedure Code. In either case, a civil action for malicious prosecution would lie. The Indian authorities are *Imperatrix v. Lakhsman Sakharam* (6), and *Ahmedbhai v. Framji Edulji* (7).

Failing malicious prosecution an action on the case would lie in common law: *Atwood v. Monger* (8). If the charge is false, and injury is occasioned, an action will lie. The plaintiff has been caused harrassment and risk, and the damage is the expenditure reasonably and properly incurred in defending himself. It cannot be said the plaintiff was acting voluntarily in appearing to defend himself at the Police enquiry. The laying of the charge is an indictable offence under section 211 of the Indian Penal Code; hence it is a wrong. The combination of wrongful action and loss, must be actionable. The laying the charge puts the plaintiff in jeopardy.

[JENKINS, C.J. referred to *Girish Chunder Mitter v. Jatadhari Sadukhan* (9)].

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|-----------------------------------|--------------------------------------|
| (1) (1910) I. L. R. 37 Calc. 358. | (5) (1888) I.L.R. 17 Calc. 574, 577. |
| (2) (1885) L. R. 14 Q. B. D. 648. | (6) (1877) I. L. R. 2 Bom. 481.      |
| (3) (1834) 6 C. & P. 423.         | (7) (1903) I. L. R. 28 Bom. 226.     |
| (4) [1897] I. Q. B. 159.          | (8) (1653) Sty. 378.                 |

- (9) (1899) I. L. R. 26 Calc. 653.



*Mr. B. C. Mitter*, for the respondent. The main question in issue is, whether there has been a "prosecution." From sections 202, 203, and 204 of the Criminal Procedure Code, it is clear that the proceedings had not reached the stage when a prosecution could be said to have commenced: see authorities cited in the notes to Swaminadhan's Code of Criminal Procedure, sections 202, 203 and 160. See also *In re Tukaram Udaram* (1). In a prosecution, the accused must be present: at the police enquiry under section 202, he need not be present or incur any expense in his defence. The object of holding the enquiry would be to prevent a prosecution if possible. At the enquiry the position of the plaintiff was not that of an "accused": *Mohesh Chunder Kopali v. Mohesh Chunder Dass* (2). In *De Rozario v. Gulab Chand Anundjee* (3), Fletcher J. based his judgment on the provisions of the Criminal Procedure Code. As regards English authorities, it is submitted they are also in respondent's favour. *Yates v. The Queen* (4) may not be directly in point, but the observations in that case are worthy of great consideration. See also *Gregory v. Derby* (5), *Hope v. Evered* (6), *Else v. Smith* (7), Clerk and Lindsell on Torts, 3rd edition, p. 609, and Bullen and Leake's Precedents, 3rd edition, p. 355, which has been followed in No. 31 of Appendix A of the First Schedule of the Civil Procedure Code. A prosecution actually commences when process is executed: in the case of a warrant, when arrest has been effected; in the case of a summons when the summons has been served. The wrong in malicious prosecution is analogous to the abuse of privileged occasions in the law of defamation: see Pollock's Law of Torts, 8th edition, p. 315, citing *Allen v. Flood* (8). If the argument for the appellant is sound, the plaintiff would not be required to prove want of reasonable and probable cause. To succeed in an action on the case, the plaintiff must bring himself

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(1) (1904) 6 Bom. L. R. 91.

(2) (1882) 10 C. L. R. 553.

(3) (1910) I. L. R. 37 Calc. 358.

(4) (1885) L. R. 14 Q. B. D. 648.

(5) (1839) 8 C. & P. 749.

(6) (1886) L. R. 17 Q.B.D. 338.

(7) (1882) 1 Dow. & R. 97.

(8) [1898] A. C. 1, 125.

1911 within the words of Lord Macnaghten in *Quinn v. Leatham*  
 GOLAP JAN (1), "that a violation of legal right committed knowingly is  
 v. a cause of action."  
 BHOLANATH KHETTRY.

*Cur. adv. vult.*

JENKINS C.J. The suit which has given rise to this appeal is described by the plaintiff as one for malicious prosecution or failing that as a suit disclosing injury and damage to him and so entitling him to relief.

The suit came in the first instance before Pugh J., who gave the parties an opportunity of placing their evidence before the Court, but both sides agreed that it would not be convenient to call evidence until it was determined whether the plaint, supplemented by certain facts as to which the parties were agreed, disclosed a cause of action. To this the learned Judge assented and in the result he has dismissed the suit. From this judgment the present appeal has been preferred.

So far as the suit purports to be one for malicious prosecution the material facts on which our decision is invited, are briefly these. On the 29th of March 1909, the defendant Bholanath Khettry laid a complaint in the Calcutta Police Court against the plaintiff for criminal breach of trust. The Magistrate under section 202 of the Criminal Procedure Code referred the matter to the Police for enquiry and finally dismissed the complaint. The question is whether assuming malice and lack of probable cause, there was such a prosecution as is necessary for the maintenance of a suit for malicious prosecution.

To determine whether or not there was a prosecution regard must be had to the Criminal Procedure Code.

Chapter XV treats of the jurisdiction of the Criminal Courts in inquiries and trials and by section 191 it is provided (among other things) that a Magistrate may take cognizance of any offence upon receiving a complaint of facts which constitute such offence. Chapter XVI deals with complaints

to Magistrates, and by the first section of this chapter, (section 200) it is provided that a Magistrate taking cognizance of an offence upon complaint shall at once examine the complainant upon oath.

Section 202 empowers a Magistrate, if he sees reason to distrust the truth of a complaint of an offence, to postpone the issue of process for compelling the attendance of the person complained against and to direct a previous local investigation to be made by a Police officer for the purpose of ascertaining the truth or falsehood of the complainant.

And then comes Chapter XVII which is headed "of the commencement of proceedings before Magistrates." Section 204 provides that if in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding and the case appears to be one in which a summons should issue in the first instance, he shall issue his summons for the attendance of the accused.

Now, in this case the stage indicated in Chapter XVII, "the commencement of proceedings before the Magistrate," was never reached: the Magistrate dismissed the complaint under section 203. A series of decisions on the Code further shows that as process was not issued the plaintiff Golap Jan never became an accused; he was not a party to the investigation held under section 202 of the Criminal Procedure Code; nor was he entitled to claim under section 304 the right to be represented by a pleader at that investigation. If, as is said, he was present and was represented by a pleader, that was not by compulsion of law but of his own free will. In my opinion therefore Pugh J. rightly decided that matters had not advanced to the stage necessary to support a suit for malicious prosecution.

I have not thought it necessary to refer to the English authorities as they can throw no certain light on the effect of the provisions of the Criminal Procedure Code by which (as it seems to me), we must be guided in determining whether or not there was in the circumstances of this case a prosecution. Still as a matter of general comment it may be noticed that

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Cotton L. J. in *Yates v. The Queen* (1) remarked, "how can it be said that a prosecution is commenced before a person is summoned to answer a complaint." And when he made this remark he obviously had in mind *Clarke v. Postan* (2), on which reliance has been placed by the plaintiff on this appeal.

But if the conditions requisite to a suit for malicious prosecution have not been established, does the plaint disclose facts otherwise entitling him to relief?

It has been suggested before us that the facts are such as disclose injury and loss and therefore relief should be awarded.

There are, it is true, certain wrongs akin to malicious prosecution which entitle the person aggrieved to sue, as for instance malicious abuse of the process of the Court, malicious arrest, malicious search, and malicious execution. But none of them are applicable to the facts of this case.

What then is the plaintiff's grievance? There was no interference with his property, he did not become an accused, and his freedom was not directly in jeopardy. The utmost that he can aver is that he was defamed.

Now apart from certain qualifying conditions defamation is a good cause of action; but even if the complaint to the Magistrate was defamatory still the complainant was entitled to protection from suit, and this protection was the absolute privilege accorded in the public interest to those who make statements to the Courts in the course of, and in relation to, judicial proceedings. I therefore hold that the plaint does not disclose facts entitling the plaintiff to relief.

The result then is, that in my opinion, this appeal must be dismissed with costs.

WOODROFFE J. I agree.

J. C.

*Appeal dismissed.*

Attorneys for the appellant: *S. D. Dutt & Ghosh.*

Attorneys for the respondent: *Roy & Chowdhry.*

(1) (1885) L.R. 14 Q.B.D. 648, 661. (2) (1834) 6 C. & P. 423.



## CRIMINAL REVISION.

*Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.*

GURU DAS KUNDU CHOWDHRY

v.

KEDAR NATH KUNDU CHOWDHRY.\*

1911

June 27.

*Dispute concerning land—Joint-owners—Claim of exclusive possession to subject of dispute, by each party—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898) s. 145.*

A dispute between two sets of joint-owners, each claiming exclusive possession of the land forming part of the joint estate, through their respective tenants, is within the scope of s. 145 of the Criminal Procedure Code. An order declaring the exclusive possession of a tenant of one party is not, therefore, without jurisdiction.

*Makhan Lal Roy v. Barada Kanta Roy* (1) distinguished.

UPON the receipt of a police report, dated the 4th February 1911, alleging the existence of a dispute likely to cause a breach of the peace between Fakir Chand Kanrar of the one party, and Sirish Chunder Bose and Nolini Behari Chatterjee of the other, regarding a plot of land measuring six cottahs in Mouza Radhadasi, Babu Khagendra Nath Mitter, Deputy Magistrate of Howrah, called upon them to show cause why they should not be bound down to keep the peace. On the 16th February proceedings under s. 145 of the Code were drawn up against the said persons as also against Roy Kedar Nath Kundu Chowdhry and one Charu Chunder Srimani, and afterwards others, including the rival Kundu Chowdhries, were added as parties.

The Kundu Chowdhries of both parties and Srimati Sarala Dasi were admittedly the proprietors of the estate to which Mouza Radhadasi appertained, and the former purchased at a Civil Court sale the tenant's interest in 32 bighas

\* Criminal Revision, No. 578 of 1911, against the order of Khagendra Nath Mitter, Deputy Magistrate of Howrah, dated April 25, 1911.

(1) (1906) 11 C. W. N. 512.

1911 of land situated in Radhadasi, of which the disputed plot was  
 GURU DAS a part. It appeared that some of the plots comprised in the  
 KUNDU above area were in the exclusive possession of the Kundu  
 CHOWDHRY Chowdhries of each party either *khas* or through their re-  
 v. spective tenants. Each party of the joint proprietors  
 KEDAR NATH KUNDU claimed exclusive possession of the disputed land through  
 CHOWDHRY. such tenants. In the present proceedings Roy Kedarnath and  
 others including his tenant, Fakir Chand, were made the  
 first party; and Guru Das Kundu and others, including Sarala  
 Dasi, the second party. Immediately south of this land there  
 was a soorkey mill belonging to Roy Kedarnath, which ceased  
 work over eight or nine years ago. Fakir Chand purchased  
 the mill in May or June 1910, and obtained a lease of the  
 land covered by it in September 1910. The land to the north  
 of the disputed plot belonged to the Kundu Chowdhries of the  
 second party and was used formerly as brick fields. At that  
 time Charu Chunder Srimani, the son-in-law of one of them,  
 made bricks there, but held no deed in respect of the land. In  
 July 1910, he executed a kabuliat in favour of the second  
 party Kundus to take effect from the middle of November  
 1901. On the 9th January 1911, Charu Chunder sold his  
 leasehold to Sirish Chunder Bose and Nolin Behari Chatterjee  
 of the second party, and a dispute then arose between these  
 latter two and Fakir Chand regarding the plot of six cottahs,  
 and each of them claimed to be in exclusive possession of the  
 same. After taking evidence the Deputy Magistrate found  
 Fakir Chand to be in such possession of the land. The peti-  
 tioners, the second party, then moved the High Court, and  
 obtained the present Rule.

*Mr. A. Chaudhuri, Babu Boidya Nath Dutt and Babu Manmohan Dutt*, for the petitioners.

*Mr. A. Caspersz, Babu Hara Kumar Mittra and Babu Ajit Ghose*, for the first party.

CASPERSZ AND SHARFUDDIN JJ. The land in dispute is six cottahs out of an area of 32 bighas. So far as the finding under section 145 of the Criminal Procedure Code is con-



cerned, it is clear that the land is in the possession of the first party, Fakir Chand Kanrar, the tenant of the same. But the question remains whether the Deputy Magistrate had jurisdiction to proceed and pass an order under the section. It is urged on behalf of the petitioners that the dispute involved the joint co-sharers who were brought on the record, and that, in accordance with the rulings of this Court, the Deputy Magistrate should have refrained from exercising jurisdiction in the matter. It appears to us, however, that the order passed in favour of one tenant, as against the other persons setting up their tenancy, was a good and valid order which does not transgress the principle applied in *Makhan Lal Roy v. Barada Kanta Roy* (1). The case here is one of exclusive possession claimed by each set of landlords through their respective tenants. The landlords of the tenant in possession can recover the entire rent from Fakir Chand Kanrar according to his lease. The presence of the rival tenants was necessary: see *Laldhari Singh v. Sukdeo Narain Singh* (2). The Rule is discharged.

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E. H. M.

*Rule discharged.*

(1) (1906) 11 C. W. N. 512.

(2) (1900) I. L. R. 27 Calc. 892.

## PRIVY COUNCIL.

P.O.\*  
1911Feb. 17, 22, 24;  
July 11.

MAUNG KYIN

v.

MA SHWE LA.

[On appeal from the Chief Court of Lower Burma.]

*Evidence, admissibility of—Evidence Act (I of 1872), s.92—Evidence of acts and conduct of parties to deeds showing that they were treated as being otherwise than they purport to be—Evidence showing actual conveyances to be only mortgages—Fraud with regard to property of third person not party to deed.*

Section 92 of the Evidence Act (I of 1872) is applicable to an instrument "as between the parties to such instrument or their representatives in interest"; but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance.

The respondents claimed to recover possession of certain parcels of land under deeds which purported to be absolute conveyances but which the appellants contended were meant to be, and had always in fact been treated by all the parties concerned, as mortgages only, and they tendered evidence of the acts and conduct of the parties to that effect. This evidence was excluded by both Courts below under section 92 of the Evidence Act. Their Lordships of the Judicial Committee on appeal were, however, of opinion that on the evidence the case for the appellants disclosed a charge of fraud against the respondents antecedent to the deeds, inasmuch as they or the persons under whom they claimed took absolute conveyances of property from the appellants with notice that such property belonged in fact to a third person, the alleged mortgagor, whose evidence would be material and necessary in the matter of the alleged fraudulent dealing.

Their Lordships, therefore, without expressing any opinion on the construction or application of section 92 of the Evidence Act in relation to the deeds, came to the conclusion that the rejected evidence should be heard, subject to any objections which the respondents might be advised to take; as the Court would then be in a position to deal hereafter (if necessary) with the admissibility of the evidence in relation not only to the deeds, but also in relation to the questions that

\* *Present:* LORD MACNAGHTEN, LORD ROBSON, SIR ARTHUR WILSON,  
AND MR. AMEER ALI.

might arise in connection with the alleged knowledge or conduct of the parties, antecedent to the execution of those deeds, and upon which their validity might possibly depend.

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APPEAL from a decree (21st December, 1908), of the Chief Court of Lower Burma in its Appellate Jurisdiction, which affirmed a decree (21st May, 1907), of the same Court in its Original Civil Jurisdiction.

The defendants were the appellants to His Majesty in Council.

The respondent Ma Shwe La was the widow, and the other respondents were the children of one U Shwe Pe, who died on 3rd April, 1905. In their plaint they claimed as his heirs and legal personal representatives according to the Burmese Buddhist law of inheritance, and sought to recover possession of certain hereditaments situate at Kemmendine, Rangoon, in Lower Burma, which they alleged to be of the value of Rs. 16,000, but which the appellants contended were worth two or three times that amount. The respondents contended that the said hereditaments were conveyed by the appellants to U Shwe Pe and Ma Shwe Lā absolutely by two deeds of sale, dated 4th March, 1903. The appellants contended that under and by virtue of an instrument dated 20th November, 1905, they were entitled to the equity of redemption in the said hereditaments subject to two mortgages thereof, which were vested in the respondents, and which the appellants were ready and willing to redeem, and the appellants further contended that as to part of the said hereditaments they were entitled to a first mortgage having priority over the mortgage of the respondents.

The main question to be determined in this appeal was whether the provisions of the Evidence Act (I of 1872) enabled the respondents to rely on the form of the deeds of sale of 4th March, 1903, as passing an absolute interest notwithstanding the fact that from the surrounding circumstances, the relationship of the parties, the negotiations leading up to the execution of such deeds, and the acts and conduct of the parties, it clearly appeared that the said deeds were intended

1911 by the parties to be and to take effect merely as transfers of  
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The property the subject of this appeal consisted of four different parcels, namely, (i) The first hereditaments: "A piece of land known as the first, second and third Eastern eighths of Second North one-eighth of Fourth Class Suburban Allotment number 4." (ii) The second hereditaments: "A piece of land known as the Fourth Eastern Section of the Second Northern portion of the eighth of Fourth Class Suburban Allotment number 4." (iii) The third hereditaments: "A piece of land known as fifth class lot numbers 14 and 15 in Block C. 1, together with the building thereon being number 66, Kemendine Road," and (iv) The fourth hereditaments: "A piece of garden land known as 4th class Suburban Allotment, number 81 containing 4 acres and 1 anna."

Both the appellants and respondents derived their title from one Ko Shwe Myaing who was formerly the owner of all the above hereditaments, and also of five other parcels of land in the same neighbourhood, not the subject of this appeal.

By an indenture of mortgage dated 21st May, 1895, the first hereditaments together with the five adjacent plots were mortgaged to one Morison to secure the payment of Rs. 12,000 and interest at the rate of nine rupees per cent. per annum. This mortgage had never been redeemed and was now vested in trustees in trust for the appellant Maung Kyin.

By an instrument of conveyance dated 30th November, 1901, Ko Shwe Myaing, with the concurrence of his son-in-law Ko Hla Baw, purported to convey the first and second hereditaments to the appellants for Rs. 8,500. No mention was made in the conveyance of the mortgage of the first hereditament of 21st May, 1895. This, as the appellants alleged, was intended by the parties to be a mortgage of the first and second hereditaments to secure the payment by Ko Shwe Myaing to the appellant of the sum of Rs. 8,500 with interest at the rate of Rs. 1-8 per cent. per mensem.

In February, 1902, the third and fourth hereditaments were sold in execution proceedings taken by one Miller against



Ko Shwe Myaing and his wife; and on 13th February, 1902, a certificate was issued declaring the appellants to be the purchasers of those hereditaments for Rs. 11,565-12. As to this the appellants alleged that the third and fourth hereditaments were in fact, purchased by the appellants on behalf of Ko Shwe Myaing and his wife pursuant to an agreement that the sum of Rs. 11,565-12 should be treated as an advance made by the appellants to them bearing interest at the rate of Rs. 1-8 per cent. per mensem.

In support of their allegation as to the conveyance dated 30th November, 1901, the appellants asserted that they could show that the conveyance was executed pursuant to negotiations for a mortgage upon the terms stated; that Ko Shwe Myaing remained in possession of the first and second hereditaments until 20th November, 1905; that he paid interest to the appellants at the rate stated on the principal money for the time being remaining due until 4th March, 1903; that he also paid to the appellants instalments of principal thereby reducing the mortgage debt to Rs. 5,000; and that such payments of interest and principal were made to the knowledge of U Shwe Pe and Ma Shwe La; and they were prepared to give the same evidence (*mutatis mutandis*) with respect to their purchase of 13th February, 1902. On the 4th March, 1903, two deeds of conveyance were executed by the appellants, one of them purporting to convey to U Shwe Pe and Ma Shwe La of the third and fourth hereditaments in consideration of Rs. 11,000, and the other purporting to convey to the same persons the first and second hereditaments in consideration of Rs. 5,000. The equity of redemption subsisting in the hereditaments was not mentioned in the conveyances, nor was any reference made therein to the mortgage of 21st May, 1895, to Morison. With respect to these conveyances of 4th March, 1903, the appellants alleged that they were intended by the parties to take effect as transfers of the existing mortgage debts of Rs. 5,000 and Rs. 11,000, the securities for the same rate of interest being reduced by 7 annas per mensem. In support of that allegation the appellants were prepared to

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adduce evidence to show that the conveyances were executed pursuant to negotiations between Ko Shwe Myaing and U Shwe Pe and Ma Shwe La for the transfer of the latter of such mortgage debts and securities at such reduced rate of interest as stated; that Ko Shwe Myaing remained in possession of the first, second, and third hereditaments until 20th November, 1905; that after the execution of the deeds of 4th March, 1903, possession of the fourth hereditaments was given to U Shwe Pe and Ma Shwe La by Ko Shwe Myaing upon an agreement that U Shwe Pe and Ma Shwe La should receive and account for the rents and profits thereof and set off the same against interest at the reduced rate due in respect of the mortgage debts; that the value of the hereditaments largely exceeded the sums of Rs. 5,000 and Rs. 11,000; that in December 1903, U Shwe Pe, as the holder of a decree against Ko Shwe Myaing, took proceedings to attach the first hereditaments; and that in order to preserve the first hereditaments from such execution the appellant Maung Kyin at the request of Ko Shwe Myaing in December, 1903, paid to U Shwe Pe Rs. 3,900 being the amount of his judgment debt.

By a deed dated 20th November, 1905, all the four hereditaments, together with the five adjacent plots, were expressed to be assured by Ko Shwe Myaing and his wife, his son-in-law Ko Hla Baw and others to the appellant Maung Kyin, subject to the mortgage to Morison, and to the mortgages for Rs. 5,000 and Rs. 11,000. The consideration for the conveyance was stated therein to be Rs. 50,238 made up as to Rs. 10,900 by payments made by the appellant Maung Kyin, as to Rs. 18,148 by the principal and arrears of interest due under the mortgage of 21st May, 1895; as to Rs. 6,122 by the principal and arrears of interest due under the mortgage of 30th November, 1901, and as to the balance of Rs. 14,568 by the principal and arrears of interest due in accordance with the agreement made between the appellants and Ko Shwe Myaing and his wife in February, 1902. The appellants alleged that upon the execution of this conveyance possession of the greater part of the



first, second, and third hereditaments was given by Ko Shwe Myaing to the appellants.

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Prior to the execution of the conveyance of 20th November, 1905, namely, on the 29th May, 1905, the mortgage to Morison, dated 21st May, 1895, was transferred by him by deed to the appellant Maung Kying; and by an instrument dated 18th November, 1905, the said mortgage was transferred by the appellant to Maung Kyouk Lone and Maung Shwe Hmon as trustees for that appellant, and that mortgage was expressly kept alive by the terms of the instrument dated 20th November, 1905.

The respondents claimed possession of the first, second and third hereditaments with mesne profits.

In defence to the suit the appellants stated the facts as above.

The suit was heard by MR. E. W. ORMOND, one of the Judges of the Chief Court of Lower Burma.

The only issue dealt with by the Court was "whether oral evidence is admissible to vary the terms of the document dated, 30th November, 1901, and the certificate of sale, dated 13th February, 1902, and of the two instruments (exhibits A and B), dated 4th March, 1903." The evidence adduced by the defendants was to the effect as above stated, and which is also summarised in the judgment of their Lordships of the Judicial Committee. The covenant in all the documents was the same but the Court dealt only with exhibit B. The Court said:—

"The defendants' case is that they themselves were only mortgagees of this property under an instrument which purports to be a deed of sale; and that at the time of the execution of these two instruments of sale (Exhibits A and B) they did not know of Morison's mortgage. The defendants contend that the plaintiffs cannot obtain possession of that portion of the property without redeeming the mortgage.

"Exhibit B purports to be a grant by defendants of their properties to the grantees and their heirs for ever with the following covenant:—'Notwithstanding anything by us done or knowingly suffered we are now entitled to execute this grant of the premises free from incumbrances and we and every person claiming through or in trust for us will do all acts required for perfecting such grant.'

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"Under the Full Bench Ruling of *Maung Bin v. Ma Hlaing* (1), the defendants are precluded from showing that this was not a sale. The question then is:—Was it a sale of the property free from the above mortgage? It was a sale of the proprietor's estate and the effect of the above covenant as to encumbrances is, I think, this:—that as owners they have neither encumbered the estate nor have they allowed any previous encumbrances of which they had any knowledge to remain on the estate. The presumption is that the owner of an estate knows what encumbrances his estate is subject to; it lies on the defendants therefore to show, *first*, that they were the owners of the estate; and, *secondly*, that although they were the owners of the estate they did not know of this mortgage. It is not sufficient for them to show that they did not know of the mortgage because they were not the owners of the estate."

and after stating the evidence which the defendants proposed to adduce, the Court said:—

"Under the Full Bench Ruling, I hold that such evidence cannot be admitted."

The suit was consequently decreed; and an Appellate Bench of the Chief Court (C. E. Fox, Chief Judge, and A. M. B. Irwin, Judge) affirmed that decision on the ground that the Court was bound by the Full Bench Ruling.

On this appeal,

*C. Bailhache, K.C.*, and *W. Arnold Jolly*, for the appellants, contended that section 92 of the Evidence Act (I of 1872) did not exclude extrinsic evidence as to the acts and conduct of the parties. There was nothing in the Evidence Act, nor in the Privy Council decision of *Balkishen Das v. Legge* (2), to make the evidence which it was desired to put in, namely, evidence of the conduct of the parties subsequent to the execution of the conveyances, inadmissible; that the appellants were not precluded by the Evidence Act or otherwise from proving by the admissions of all the parties to the instrument dated November 30th, 1901, that such instrument was intended to take effect, not as a deed of sale, but as a mortgage, nor from proving that the purchase of 13th February, 1902, was made by the appellants upon the terms and pursuant to

(1) (1905) 3 L. Burma Rul. 100.

(2) (1899) I. L. R. 22 All. 149;  
 L. R. 27 I. A. 58.

the agreement that the sum of Rs. 11,565-12, for which the purchase was made, should be treated as an advance made by the appellants to Ko Shwe Myaing and his wife bearing interest at the rate of 1-8 per cent. per mensem, and that the purchase was, therefore, really made by the appellants on their behalf; that the appellants were not precluded from giving evidence to prove that the instruments dated 4th March, 1903, were intended to be transfers of existing mortgages, and not conveyances, and that the Court of first instance was wrong in rejecting such evidence; and that it was a fraud on the part of the respondents to deny that the hereditaments in those deeds were conveyed to U Shwe Pe and Ma Shwe La subject to the equity of redemption therein of Ko Shwe Myaing, and that the provisions of the Evidence Act did not prevent the proof of a fraud. Reference was made to *Balkishen Das v. Legge* (1); Evidence Act (I of 1872), sections 91 and 92; *Khankar Abdur Rahman v. Ali Hafez* (2); *Mahomed Ali Hossein v. Nazir Ali* (3); *Achutaramaraju v. Subbaraju* (4); *Preonath Shaha v. Madhu Sudan Bhuiya* (5); *Baksu Lakshman v. Govinda Kanji* (6); Evidence Act, section 115; *Maung Bin v. Ma Hlaing* (7), on which the case under appeal was decided; Transfer of Property Act (IV of 1882), section 55, sub-section 1, clauses (f) and (g); *David v. Sabin* (8); *Heath v. Crealock* (9), per Lord Cairns: Specific Relief Act (I of 1877), section 26, clause (d) and section 33: Ameer Ali and Woodroffe's Law of Evidence (Ed. 1902) 633; Rawle on Covenants, 4th Ed., pages 198, 200, note (2); and *Clare v. Lamb* (10). In any event, the decree appealed from was wrong, for the appellants were not bound to relieve the first hereditaments from the mortgage of 21st May, 1895, and were entitled to set up that mortgage against the respondents.

- (1) (1899) I.L.R. 22 All. 149, 158; (5) (1898) I. L. R. 25 Calc. 603.  
 L. R. 27 I. A. 58, 65. (6) (1880) I. L. R. 4 Bom. 594, 605.  
 (2) (1900) I. L. R. 28 Calc. 256, (7) (1905) 3 L. Burma Rul. 100.  
 258, 259. (8) [1893] 1 Ch. 523, 529, 534.  
 (3) (1901) I.L.R. 28 Calc. 289, 291. (9) (1874) L.R. 10 Ch. App. 22, 30.  
 (4) (1901) I.L.R. 25 Mad. 7, 12, 13. (10) (1875) L.R. 10 C.P. 334, 338, 340.

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*Roskill, K.C., and J. W. McCarthy, for the respondents,*

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contended that evidence was inadmissible to vary the terms of the deeds which the appellants were desirous of proving to be mortgages, and not actual transfers as they purported to be, and such evidence had been rightly rejected. The respondents were purchasers for valuable consideration, without notice that the deed of 30th November, 1901, and the certificate of sale of 13th February, 1902 were in fact mortgages (which the respondents, however, denied), and not deeds of sale, and the terms of such instruments could not be varied as against them. The deeds of conveyance of 4th March, 1903, were signed and sealed by the appellants as parties to the deeds, and they were now estopped from denying their effect, and from giving evidence to contradict them in this suit. It was pointed out that no claim had ever been made by the appellants to have the deeds rectified, nor had they alleged any acts of fraud, intimidation, illegality, want of due execution, want of capacity, failure of consideration or mistake in fact or in law, or any other ground which would entitle them to have the deeds rectified, set aside, or varied, under the Evidence Act, or otherwise, nor had they alleged any reasons why, if the deeds were not deeds of sale they had been executed in that form. It was also contended that the first appellant was not entitled to set up the mortgage of 21st May, 1895, as against his grant contained in the deed of 4th March, 1903; that under the covenant for further assurance in the deed of 4th March, 1903, the first appellant was bound to convey the interest and estate vested in him under the mortgage of 21st May, 1895, and the transfer thereof to him of 29th May, 1905, to the respondents in pursuance of such covenant; and that the respondents were entitled to have the securities comprised in that mortgage marshalled so as to relieve the property in suit therefrom, or in the alternative that the said property should only be subject to a proper proportion of the amount due on such mortgage. It was further contended that under clause (g) of sub-section 1 of section 55 of the Transfer of Property Act, the appellants were



bound to discharge any incumbrance on the property. Reference was made to *Sah Lal Chand v. Indarjit* (1): Evidence Act (I of 1872), section 92 (under which it was said that everything oral must be excluded, and that the prohibition extended to the conduct and acts of the parties to the deeds); and *Daimoddee Paik v. Kaim Taridar* (2); and the cases of *Khankar Abdur Rahman v. Ali Hafez* (3), and *Mahomed Ali Hossein v. Nazar Ali* (4), cited for the appellants, were distinguished from the present case. *Maung Bin v. Ma Hlaing* (5) [LORD MACNAGHTEN referred to illustration (b) of section 92 of the Evidence Act]: Transfer of Property Act (IV of 1882), section 55, sub-section 1, clause (g), sub-section 2 and sub-section 6, clause (a), and sections 56 and 58; *Noel v. Bewley* (6) [LORD MACNAGHTEN referred to *Smith v. Osborne* (7), as overruling the last named case]; *Smith v. Baker* (8); *In re Bridgwater's Settlement*; *Partridge v. Ward* (9); Transfer of Property Act, section 43; and *Shepherd and Brown's* Transfer of Property Act, 7th Ed., page 133.

*Bailhache, K.C.*, replied: The evidence the appellant wanted to put in, was documentary not oral.

The judgment of their Lordships was delivered by

LORD ROBSON. The appellants are defendants in this action which was brought by the respondents in the Chief Court of Lower Burma on its original civil side. Judgment was there given in favour of the respondents, and was affirmed on appeal to the Court on its Appellate Side.

The action was brought to recover possession of certain parcels of land which may be conveniently referred to as the first, second, third, and fourth hereditaments. The respondents claimed under certain deeds which purported to be absolute conveyances, but which the appellants contended were meant to be, and had always in fact been, treated by all the

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|-------------------------------------|--------------------------------------|
| (1) (1900) I.L.R. 22 All. 370, 375; | (5) (1905) 3 L. Burma Rul. 100.      |
| L. R. 27 I. A. 93, 97.              | (6) (1829) 3 Simon 103.              |
| (2) (1879) I. L. R. 5 Calc. 300.    | (7) (1857) 6 H. L. C. 375, 397, 399. |
| (3) (1900) I. L. R. 28 Calc. 256.   | (8) (1842) 1 Young & Col. Ch. C. 223 |
| (4) (1901) I. L. R. 28 Calc. 289.   | (9) [1910] 2 Ch. 342.                |

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1911 parties concerned as mortgages only, and they tendered evi-  
 MAUNG KYIN dence of the acts and conduct of the parties to that effect.  
 v. This evidence was excluded by the Courts below under section  
 MA SHWE LA. 92 of the Indian Evidence Act, 1872, and the principal ques-  
 tion arising on this appeal is whether or not that evidence  
 was properly rejected.

The respondents also claimed that the appellants were bound under the covenants for title contained in the conveyance they had executed in favour of the respondents, to discharge a mortgage existing on the premises at the time of the conveyance.

On the 21st May, 1895, Ko Shwe Myaing owned all the properties in question and he mortgaged the first hereditaments (with certain other properties not in dispute) to one Morison for 12,000 rupees. On the 30th November, 1901, he executed, what purported to be an absolute conveyance of the first and second hereditaments to the appellants for the sum of Rs. 8,500, saying nothing in the conveyance about the mortgage to Morison. The appellants allege that this document, though in form a conveyance, was in truth a mortgage, and that possession of the property was retained by Ko Shwe Myaing who paid various sums by way of interest on the alleged purchase money, and in part repayment of the principal sum showing, as they contend, that it was merely a loan.

Early in 1902, the third and fourth hereditaments were sold under an order of the Court in an action by one Miller against Ko Shwe Myaing. They were purchased by the appellants for Rs. 11,565, and a certificate of the sale was accordingly given by the Court to the appellants. With regard to this transaction the appellants contend that it also was in substance a mortgage and that Ko Shwe Myaing remained in possession until the 20th November, 1905, when he executed a deed purporting to transfer the equity of redemption in all the said properties to the appellants absolutely.

On the 4th March, 1903, by two instruments of conveyance of that date, the appellants purported to convey the



before-mentioned four sets of hereditaments to U Shwe Pe and his wife Ma Shwe La. The consideration money for the first <sup>1911</sup> MAUNG KYIN and second hereditaments was stated as being 5,000 rupees, <sup>v.</sup> MA SHWE LA. and for the third and fourth hereditaments as 11,000 rupees. The appellants allege that U Shwe Pe and Ma Shwe La knew that they, the appellants, were mortgagees merely, and that the supposed purchase moneys for the properties were simply the amounts of the mortgage debts outstanding, they having been to some extent reduced by repayments of principal, so that the deeds in question were in truth mere transfers of mortgages, and not absolute conveyances. The deeds of the 4th March, 1903, were not followed by possession on the part of the respondents, except as to the fourth hereditaments, possession of which was, according to the appellants, taken by the respondents on the terms that they, the respondents, should account for the rents and profits against interest at a reduced rate in respect of the mortgage debts.

In the month of December, 1903, the said U Shwe Pe, as the holder of a decree against the said Ko Shwe Myaing, took proceedings to attach the first hereditaments, and, in order to preserve them from execution, the appellant, Maung Kyin, at the request of Ko Shwe Myaing, paid U Shwe Pe the amount of his execution debt. Of course a transaction of this kind, if proved, was clearly inconsistent with the respondents' contention that U Shwe Pe had become the owner of these premises by the deed of the 4th March, 1903, and would go to establish the contention of the appellants that that deed was only a transfer of a mortgage.

On the 29th May, 1905, Morison's mortgage was transferred to trustees on behalf of the appellants, and was expressly kept alive by the terms of the said Indenture of the 20th November, 1905, under which Ko Shwe Myaing purported to convey the equity of redemption to the appellants absolutely. The appellants entered into possession of the first, second, and third hereditaments under the conveyance of 1905, and the respondents brought this action against them on the 20th December, 1905, to have it declared that they, the res-

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pondents, were absolute owners of the hereditaments in question. U Shwe Pe had, in the meantime, died, and the action was maintained by his widow and legal representatives.

The appellants at the trial sought to prove—(i) that the value of the hereditaments far exceeded the amount of the sums specified as the consideration moneys in the conveyances; (ii) that interest was paid on those moneys and that they were in part repaid, thus showing that they were loans only; (iii) that U Shwe Pe and Ma Shwe La were all aware of this, and knew (as shown by negotiations between themselves and Ko Shwe Myaing as well as the appellants) that the documents of the 30th November, 1901, and 13th February, 1902, under which the appellants claimed and the benefit of which they transferred to U Shwe Pe and Ma Shwe La, were mortgages only; (iv) that possession of the hereditaments remained with the alleged vendors; and (v) that after the alleged sale to U Shwe Pe and Ma Shwe La, of the 4th March, 1903, U Shwe Pe himself treated the property as belonging to the alleged mortgagor, Ko Shwe Myaing, and attached a portion of it in execution of a decree against him or his wife.

The evidence which the appellants thus proposed to tender was described in general terms, and their Lordships have not the advantage of dealing with it in the form of questions specifically put and argued. So far, however, as it is still pressed, it, no doubt, consisted only of evidence relating to the acts and conduct of the parties as distinguished from evidence of oral statements and conversations constituting in themselves some agreement between them. Its object was to show that whatever the terms of the documents may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions, they had always treated the business between them as one of loan secured by mortgage.

This may give rise to important and difficult questions under section 92 of the Indian Evidence Act, which provides

that when the terms of any contract required by law to be reduced to the form of a document (and sales or mortgages of land are, by sections 54 and 58 of the Transfer of Property Act, 1882, included among such contracts), "no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms."

The case has been argued before their Lordships as though the questions in dispute turned entirely on the construction of this section as applied to the deeds of the 4th March, 1903, under which the respondents claim. Their Lordships, however, are of opinion that the case for the appellants disclosed a charge of fraud against the respondents in relation to matters antecedent to those deeds, on which much of the evidence tendered would certainly be material. Thus it is said that the respondents, or the persons under whom they claim, took absolute conveyances of property from the appellants with notice that they in fact belonged to a third person, namely, the alleged mortgagor, Ko Shwe Myaing. If this be so, section 92 of the Indian Evidence Act, even if construed according to the respondents' contention, will not avail them. It is applicable to an instrument "as between the parties to any such instrument or their representatives in interest," but it does not prevent proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. The evidence of Ko Shwe Myaing is of course material and necessary on this point, and their Lordships after giving to this case very careful consideration, and without at present expressing any opinion on the construction or application of section 92 of the Indian Evidence Act in relation to the deeds of the 4th March, 1903, think that the rejected evidence should be heard, subject to any objections the respondents may be advised to take. The Court will then be in a position to deal hereafter (if it should become necessary) with the admissibility of the evi-

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dence in relation not only to the deeds of the 4th March, 1903, but also in relation to the questions that may arise in connection with the alleged knowledge or conduct of the parties antecedent to the execution of those deeds and upon which their validity may possibly depend.

The claim of the respondents to have the mortgage existing on the premises at the time of the conveyance, discharged by the appellants will be dealt with, if necessary, after the case has been reheard.

Their Lordships will therefore humbly advise His Majesty that this action be referred to the Chief Court of Lower Burma for a new trial. The respondents must pay the costs of this appeal. The other costs will abide the result of the new trial and will be dealt with by the Chief Court.

*Appeal allowed.*

*Case remanded for new trial.*

Solicitors for the appellants: *A. H. Arnold & Son.*

Solicitors for the respondents: *Bramall & White.*

J. V. W.



## APPEAL FROM ORIGINAL CIVIL.

*Before Mr. Justice Woodroffe and Mr. Justice Carnduff.*

ARNOLD v. ARNOLD.\*

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Jan. 31.*Divorce—Wife's petition—Admission by respondent—Effect of husband's admission of adultery and cruelty, supported by confirmatory evidence.*

In a suit for dissolution of marriage, in the absence of collusion, an admission of guilt by one of the parties, is cogent evidence which the Court will act on, especially if the admission is corroborated by other evidence.

*Robinson v. Robinson and Lane* (1), followed.

APPEAL by the petitioner, Mrs. Florence Arnold, from the judgment of Harington J.

This appeal arose out of an undefended matrimonial suit in which the wife sought a decree for the dissolution of her marriage, on the grounds of adultery and cruelty of her husband.

The petitioner and her husband, George Villiers Arnold, were married in Sheffield on the 8th March, 1902. A child was born in March, 1904, but survived only a few months. In 1908 the petitioner and the respondent joined the Bandmann Theatrical Company and came out to India in June of the same year. The petitioner charged her husband with having committed adultery between the months of May and August, 1909, with a ballet mistress employed in the same company, but condoned his offence and resumed cohabitation with him.

Thereafter the petitioner and respondent joined the Bandmann Opera Company. The petitioner charged the respondent with having committed adultery on several occasions between the months of December 1909, and February 1910, in Calcutta with one Miss Hebe Kneller who was also a member of the same company. The parties as well as Miss Kneller were

\*Appeal from Original Civil, No. 2 of 1911, in suit No. 16 of 1910. (Matrimonial Jurisdiction).

(1) (1859) 1 Sw. & Tr. 362.

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residing at the time at the Albany Hotel, at 10, Kyd Street, Calcutta.

The petitioner in her evidence mentioned certain acts of familiarity between her husband and Miss Kneller and in particular stated that, one night in January, 1910, at 1-30 A.M., she entered Miss Kneller's bedroom and saw her "husband leaning on Miss Kneller and she was in bed in her night dress." Her husband was dressed in his waistcoat and had not taken off his clothes to go to bed. She called her husband away and accused him and "he admitted every thing."

After this incident in January, 1910, the petitioner ceased to cohabit with the respondent. Evidence of cruelty was also given by the petitioner, who further alleged that there was no collusion or connivance between her and the respondent.

Two other members of the Opera Company were called as witnesses, and although unable to give evidence of any acts of adultery, they spoke to the relations between the respondent and Miss Kneller amounting to a public scandal, so much so, that Miss Kneller was finally dismissed from the company on the 4th June, 1910, while the company was playing at Yokohama. It appears the respondent paid the lady's passage back to England.

On the return of the Opera Company to Calcutta after its tour in the Far East, the wife threatened divorce proceedings, and on the 23rd November, 1910, the husband wrote to his wife in the following terms:—

"Hotel Continental,  
12, Chowringhee Road,  
Calcutta, Nov. 23, 1910.

"My dear wife,

I have heard that you are bringing divorce proceedings against me, and I believe that you are charging me with adultery with a certain lady in the company, and cruelty in Calcutta, both of these charges I am bound to admit to, as you have probably secured substantial proofs as to the cruelty, which has occurred during passion, I sincerely regret.

I shall not defend the case under the circumstances.

Your Husband,  
(Sd.) G. V. Arnold."



A few days after the petition was filed, but before the issue of citation, the husband wrote on the 30th November 1910, a second letter to his wife in the following terms:—

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"Hotel Continental,  
12, Chowringhee Road,  
Calcutta, Nov. 30, 1910.

"Dear Floss,

I can't go away without writing and wishing you good-bye. I would have said good-bye personally, only I suppose my presence would have been distasteful to you. I am sorry we have finished up like this. I know I am losing a good woman, for I believe you to be good, and trust you will always try and be so. I wish you the best of everything and hope that you may meet and marry a good man who will make you happier than I have done. When you go to England don't abuse my poor mother, will you?

Good-bye and best wishes,

Yours,  
George."

The husband did not file an answer or defend the suit.

On the 3rd January, 1911, Harington J. dismissed the petition, holding that adultery had not been established. His Lordship observed as follows:—

"This is a petition by the wife for dissolution of marriage on the ground of cruelty and adultery of her husband. To enable her to succeed in this Court it is necessary to prove some specific act of adultery committed in India. Now, the lady has given her evidence and she is the only witness who has spoken to facts from which it is said that particular acts of adultery ought to be inferred. It was argued by her learned counsel that the question whether the adultery was established depended on whether she was believed or not. I don't agree with that proposition. Her evidence was given in a frank and straightforward manner, and I have no doubt that each fact to which she spoke was truly stated by her, but the question is, are the facts she has proved sufficient to justify the inference that on any of the occasions, she has spoken to, adultery was committed. In the first instance, she found her husband in the room of a Miss Kneller, who was in bed, but the door of the room was unfastened and the husband was in his ordinary dress and I don't think that the fact that a man in ordinary clothes is in the bed-room of a woman with the door open, without any further evidence that something took place, would justify the inference that he had committed adultery with the lady in whose room he was. A different inference might be drawn if the door had been fastened, and there were evidence of any fact which would justify one in supposing that he had been sharing her bed. Then the other instance is an occasion, when she left him in the drawing room, and on going there later

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found he was not there. Afterwards when she saw him she charged him with having been in the lady's room and he told her to mind her own business. That circumstance is not sufficient. There is nothing to show whether he really went to the lady's room on that occasion, or if so, how long he was there, whether he was alone with the lady or whether the door was shut or open. The next fact she proved was an act of familiarity with the lady in the Albany Hotel which took place in her presence, and another witness has spoken to another act of familiarity which took place at the back of the stage. In my view, these are not sufficient to establish a charge of adultery. If, when acts of familiarity have been proved, it had been shown that the husband had been in this lady's bed-room after taking steps to prevent any interruption by a third party, it is possible that an inference might have been drawn that he had committed adultery. This has not been shown and I have no course therefore, but to hold that the petitioner has not established the acts of adultery charged. I must, therefore, dismiss the petition."

From this judgment, the petitioner appealed.

*Mr. Eardley Norton (Mr. Pearson with him)*, for the appellant. Harington J. found the petitioner to be a truthful witness, hence there can be no question of collusion. Collusion being negatived, the respondent's letters, being admissions of guilt, are conclusive evidence against him: *Robinson v. Robinson and Lane* (1), *Williams v. Williams and Padfield* (2). Further, the evidence corroborates the written admission of the respondent. Again, the evidence proves both guilty passion and opportunity and the legal inference of the commission of adultery must follow.

The respondent did not appear.

WOODROFFE J. In this case the petitioner asks for the dissolution of her marriage with the respondent on the grounds of adultery and cruelty. He has been served with a notice by the petitioner. But he has entered no defence on either of the charges and he does not appear in this appeal. Adultery has been sought to be proved in this case both by admissions oral and documentary and other acts from which it is contended adultery should be inferred. In particular in a letter of 23rd April, 1910, which the respondent wrote

(1) (1859) 1 Sw. & Tr. 362.

(2) (1865) L. R. 1 P. & D. 29.

to the petitioner, he writes as follows:—"I believe that you are charging me with adultery with a certain lady in the Company and cruelty in Calcutta, both of these charges I am bound to admit to, as you have probably secured substantial proofs as to the cruelty which has occurred during passion I sincerely regret. I shall not defend the case under the circumstances." I have no doubt that "the lady in the Company" is Miss Kneller. There has been no question of any other.

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Another letter has been proved dated the 30th November 1910 in which with other things he states "I can't go away without writing and wishing you good-bye. I would have said good-bye personally, only I suppose my presence would have been distasteful to you. I am sorry we have finished up like this. I know I am losing a good woman, for I believe you to be good and trust you will always try and be so."

From the evidence of McGarth it appears that the respondent was very fond of Miss Kneller, a member of the Company and on one or two occasions he asked McGarth not to speak to his wife about it.

Mr. Smith, the Manager of the Bandmann Opera Company, states that he himself had charged both the respondent and Miss Kneller with the intimacy alleged to exist between them and that neither denied it. Subsequently both of them left the company. The evidence of Mr. Bury, Manager of the Empire Theatre, is that in consequence of the relationship existing between the parties the petitioner asked him for a separate room. Mr. Justice H rington in his Judgment states that "the petitioner gave her evidence in a frank and straightforward manner and I have no doubt that each fact to which she spoke was truly stated by her." One of such facts was that there was no collusion. Nor is there any ground for suspecting collusion in this case. The learned Judge, however, adds "but the question is, are the facts she has proved sufficient to justify the inference that on any of the occasions she has spoken to adultery was committed?" If the learned Judge was not satisfied as regards the evidence tendered, I think

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that under the circumstances of this case, the petitioner might have been given an opportunity to produce such further evidence as the Court thought was necessary, as I have stated no collusion is proved or suggested. In the present case admissions have been proved. Doubtless, caution is required in cases of Divorce to see that there is no collusion and an admission must be examined from this point of view. But if, as here, there is no reason to suspect collusion an admission may be as cogent evidence in these as in any other cases. In *Robinson v. Robinson* (1), Sir Alexander Cockburn says:—"The Divorce Court is at liberty to act and is bound to act on any evidence legally admissible by which the fact of adultery is established. If, therefore, there is evidence not open to exception of admissions of adultery by the principal respondent, it would be the duty of the Court to act on these admissions although there might be a total absence of all other evidence to support them. The admission of a party charged with a criminal or wrongful act, has at all times and in all systems of jurisprudence been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it." It is to be observed that the learned Chief Justice says that it is the duty of the Court to act on admissions although there might be a total absence of all other evidence to support them. The present case is stronger. Not only is there no reason to suspect collusion but the evidence which has been given supports and corroborates the written admission of the respondent. Evidence has also been given of acts from which the Court was asked to draw the inference of adultery. It is unnecessary to consider whether these facts, if they stood alone, would be sufficient to prove the alleged adultery. However they may be and guarding myself from being supposed to say that they are insufficient, it is sufficient to say that I have no doubt that the admission contained in the letters of the

(1) (1859) 1 Sw. & Tr. 362.

respondent are truthful admission of facts. In my opinion, the acts of adultery and cruelty charged have been proved. I would therefore reverse the judgment of Mr. Justice Harrington and pass a decree *nisi* or dissolution of marriage with costs.

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CARNDUFF J. I agree, and have nothing to add to the judgment which has been delivered by my learned brother.

J. C.

*Appeal allowed.*

Attorneys for the petitioner: *Morgan & Co.*

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice,  
and Mr. Justice Woodroffe.*

AMLOOK CHAND PARRACK

v.

SARAT CHUNDER MUKERJEE.\*

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July 20

*Mortgage—Preliminary mortgage decree—Application for sale of mortgaged property—Limitation Act (IX of 1908), Sch. I., Arts. 181, 182 and 183. Transfer of Property Act (IV of 1882), ss. 88 and 89—Civil Procedure Code (Act V of 1908) o. XXXIV. rr. 4 and 5; o. XLI, r. 20—Party, addition of.*

A preliminary mortgage decree under s. 88 of the Transfer of Property Act, 1882, does not require, and is not followed by any supplemental decree, but only, if necessary, by an application for an order absolute for sale under s. 89 of the Transfer of Property Act.

Such an application is a petition for realization by the mortgagee of his decree, and is an application "to enforce a judgment or decree," etc., within the provisions of Art. 183 of the Limitation Act, 1908.

*Harendra Lal Roy Chowdhri v. Maharani Dasi* (1) referred to; *Madhab Mani Dasi v. Lambert* (2) discussed.

It is a question for the Court in its discretion to determine in each case whether or not it will make an order for the addition of a party as contemplated by o. XLI, r. 20 of the Code of Civil Procedure, 1908.

\* Appeal from Original Civil, No. 62 of 1910.

- (1) (1901) I. L. R. 28 Cal. 557; (2) (1910) I. L. R. 37 Cal. 796;  
L. R. 28 I. A. 89, 97. 15 C. W. N. 337.



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APPEAL by Amlook Chand Parrack, the plaintiff, from the judgment of Fletcher J.

By a deed of mortgage dated the 25th January 1886, the respondent mortgaged, *inter alia*, his undivided quarter share of and in the premises No. 30, formerly No. 49, Clive Street, Calcutta, to the appellant. On the 10th December 1886, the appellant instituted a suit against the respondent to enforce the mortgage, and on the 16th December 1886, the parties consented to a decree in the following terms:—

"It is ordered and decreed with the consent of the plaintiff by his counsel and of the defendant in person that the defendant do at the end of six months from the date hereof, that is, on the fifteenth day of June one thousand eight hundred and eighty-seven on the middle floor of the Court-house opposite the Registrar's room pay to the plaintiff the sum of Rupees twenty-five thousand three hundred and eighty-two and eight annas with interest thereon at the rate of twelve per cent. per annum from the date hereof until payment. And it is further ordered and decreed with the like consent that upon payment as aforesaid, the plaintiff do reconvey or retransfer the properties comprised in mortgage in the plaint in this suit mentioned free from incumbrances done by him or any person claiming by from or under him and do deliver up all deeds and writings in his custody or power relating thereto upon oath or solemn affirmation to the defendant or to whom he shall appoint; but in default of such payment as aforesaid, it is further ordered and decreed with the like consent that the properties comprised in the said mortgage be sold with the approbation of the Registrar of this Court to the best purchaser or purchasers that can be got for the same provided the said Registrar shall consider that a sufficient sum has been offered, and in order to such sale let the plaintiff produce before the said Registrar upon oath or solemn affirmation all deeds and writings in his custody or power relating to the said property. And it is further ordered and decreed with the like consent that the money to arise by such sale be paid into Court to the end that the same may be duly applied in payment of the said sum of rupees twenty-five thousand three hundred and eighty-two and eight annas with interest thereon as aforesaid. And it is further ordered and decreed with the like consent that if the money to arise by such sale shall not be sufficient for the payment in full of the said sum of rupees twenty-five thousand three hundred and eighty-two and eight annas with interest thereon as aforesaid the defendant do pay to the plaintiff the amount of the deficiency together with the plaintiff's costs of this suit to be taxed by the Taxing Officer of this Court under the heading "class 1 short causes."

On the 8th April 1903, the respondent sold his share in the aforesaid premises No. 30, Clive Street, to one Norendra



Krishna Bose who, on the 1st December 1903, transferred his interest to one Upendra Lal Bose.

The respondent never paid any portion of the decree, and on the 3rd July 1910 (more than 23 years after the date of the decree) the appellant applied for an order that he may be at liberty to add Upendra Lal Bose, the purchaser, as a party defendant, and to proceed to sell the mortgaged properties pursuant to the decree of the 16th December 1886. Fletcher J. held that this was merely an application to enforce a decree within the meaning of Art. 183 of the Limitation Act 1908, and was therefore barred. His Lordship dismissed the application adding that in the circumstances it was not necessary to decide whether Upendra Lal Bose should be added as a party to the suit or not.

From this decision the plaintiff appealed.

Mr. B. C. Mitter (Mr. B. Chakravarti and Mr. N. N. Sircar with him), for the appellant. The decree in this suit is the usual mortgage decree and is the same as that prescribed by Schedule I, Appendix D, Form IV of the Code of Civil Procedure, 1908.

The question is whether this is a mortgage decree. If it is, it is not barred. A decree for sale cannot be executed until it is made absolute: *Tara Prosad Roy v. Bhobodeb Roy* (1), and a consent decree is not a decree within the Transfer of Property Act: *Bechu Singh v. Bicharam Sahu* (2). This is an application for an order absolute for sale under s. 89 of the Transfer of Property Act, and such applications are not barred by limitation: *Madhab Moni Dasi v. Lambert* (3), *Ajudhia Pershad v. Baldeo Singh* (4), *Pramatha Chandra Roy v. Khetra Mohan Ghose* (5). It is immaterial that the decree does not provide for the taking of an account, because this can always be waived: *Dymond v. Croft* (6).

(1) (1895) I. L. R. 22 Calc. 931. (4) (1894) I. L. R. 21 Calc. 818.

(2) (1909) 10 C. L. J. 91. (5) (1902) I. L. R. 29 Calc. 651.

(3) (1910) I. L. R. 37 Calc. 796; (6) (1876) 3 Ch. D. 512, 515.

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Article 183 of the Limitation Act does not apply, because the appellant has not yet got a complete decree.

*Mr. S. P. Sinha* (with him *Mr. P. R. Das*) for the respondent. Prior to the Code of Civil Procedure, 1908, there were conflicting decisions as to s. 89 of the Transfer of Property Act. The Code of Civil Procedure 1908, deliberately incorporated s. 89 and the other sections relating to mortgage decrees, in order to do away with the conflict that existed. The old procedure ceased to exist on the passing of the new Code, and subsequent orders and applications should be continued under the new Code. If that is so, Art. 181 of the Limitation Act applies. In so far as *Madhab Moni Dasi v. Lambert* (1) decided that Art. 181 of the Limitation Act has no reference to applications following upon a preliminary mortgage decree, it is submitted the decision is wrong. If the decree is not absolute, it comes under either Art. 181 or Art. 183 of the Limitation Act.

The new Limitation Act of 1908 applies to this case, because it repealed the old Limitation Act. Under the General Clauses Act 1897, s. 6, sub. ss. (c) and (e), the repeal would not affect any right accrued under the enactment repealed or any legal proceeding in respect of any such right, unless a different intention appears. It is submitted in the first place, that in this case the right did not accrue before the repeal of the old Act, and secondly, that the new Act shows an intention to the contrary inasmuch as ss. 30 and 31 expressly give the party, who has a right accrued under the old Act, a further period of 2 years if the 2 years expire earlier than the period under the old Act. If s. 6 of the General Clauses Act had already provided for this, ss. 30 and 31 of the new Limitation Act 1908 would be meaningless.

Even if the Limitation Act does not apply, the Courts will apply the rules of equity and good conscience if there has been unreasonable delay: *Tiluck Singh v. Parsotein Proshad* (2), and the Courts will put a limitation by analogy

(1) (1910) I. L. R. 37 Calc. 796; (2) (1895) I. L. R. 22 Calc. 924.  
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to the Limitation Act: *Bechu Singh v. Bicharam Sahu* (1), but it is submitted that this case comes within either Art. 181 or Art. 183 of the Limitation Act, 1908.

Finally, this is not a decree under s. 88 of the Transfer of Property Act, and therefore s. 89 cannot apply.

*Mr. S. R. Das* (with him *Mr. P. C. Mazumdar*), for U. L. Bose. My client cannot, at this stage, be made a respondent. The Court can, of course, add a party at any time, but that does not do away with the difficulty that the appeal had to be filed within 20 days of the order of Fletcher J. It is a matter of discretion for the Court.

*Mr. B. Chakravarti*, in reply. The decree is in two parts. It is in the same form as the decree given by the Courts now, except that the taking of an account is waived, and until the further order is obtained, the earlier order could not be enforced.

Art. 183 of the Limitation Act, 1908, pre-supposes the existence of a decree, order, or judgment which is capable of being put into effect without any further order. A sale under a mortgage decree is not a sale in execution, because there is no attachment. I am free from the present Code, and if so I am free from the provisions of the Limitation Act. The appellant has not been guilty of laches or unreasonable delay, as there was a partition suit pending, and he took a mortgage *pendente lite*. The portion has now been allotted and the appellant wishes to proceed against it.

With regard to the point that if the Limitation Act does not apply there is no limitation at all, there is in practice a bar again this, *viz.*, cases not proceeded with are put on a list, and unless good cause is shown, are struck out.

JENKINS C.J. The appellant is a mortgagee, and the mortgage under which he claims is dated the 25th January 1886. On the 16th of December 1886, he obtained a decree on his mortgage by consent. On the 3rd of July 1909 he made the application out of which the present appeal arises: and,

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by that application, he asks that he may be at liberty to add Upendra Lal Bose as a party defendant to the suit, and that thereafter he may be at liberty to proceed to sell, pursuant to the decree made in this suit on the 16th December 1886, an undivided quarter share of the defendant Sarat Chandra Mukerjee of, and in premises No. 30 formerly No. 49, Clive Street, Calcutta, and Nos. 1, 2 and 3 Bishoo Babu's Lane, Kidderpore, and the family dwelling house at Kidderpore, and that for the purpose of such sale all necessary directions may be given to the Registrar. Mr. U. L. Bose's position is that on the 1st December 1903, he became a purchaser of the Clive Street property, and in his affidavit he states that "he is a *bona fide* purchaser for full market value, that he had no notice of the plaintiff's claim, that he had laid out large sums of money with borrowed funds in the improvement of the property, and that other persons besides himself have got an interest therein, and that it would be extremely hard if after the lapse of 23 years the plaintiff is allowed to assert a claim which he had given up years ago."

The case was heard by Mr. Justice Fletcher, the parties before him being the applicant, the mortgagee, on the one side, and on the other the mortgagor and Mr. U. L. Bose who resisted the application with success. From the adverse judgment of Mr. Justice Fletcher the present appeal has been preferred; and, I will, at the outset, deal with a point taken on behalf of Mr. U. L. Bose. His name does not appear as a respondent, and therefore, it is maintained, as against him the judgment of Mr. Justice Fletcher cannot be touched. But it appears that the appellant made every effort, he could, to make Mr. U. L. Bose a party respondent. He may not have proceeded in the most approved manner, still undoubtedly he was anxious to have Mr. U. L. Bose as a respondent. Having failed in his endeavour, because he could not persuade the Court Officers to grant the necessary process, he has applied under order XLI, rule 21, that Mr. U. L. Bose may be added as a respondent here. It has been suggested that the Court has not power to do that, inasmuch as the time

for appealing has elapsed; but it is for the Court in its discretion to determine in each case whether or not it will make an order under order XLI, rule 20. I have indicated the circumstances under which it became necessary to make the application in this case, and I think that the appellant is entitled to ask that Mr. U. L. Bose should be made a party, and that there should be an order to that effect. Therefore, I propose to deal with this appeal on the footing of Mr. U. L. Bose being a respondent before us.

It is to be noticed that the decree on the mortgage was made so far back as the 16th December 1886, and that the present application was made in 1909. Those dates have naturally prompted the respondents to raise a plea of limitation. The question that we have to decide is whether the applicant is right when he contends that he is, so far as this application goes, free from the law of limitation.

Now, the decree first provides for personal payment by the mortgagor and this is followed by a provision for the return of documents and so forth, on payment in accordance with this personal decree. Then there is a provision that in default of payment there is to be a sale of the property, and it is further ordered that if the money realised by such sale shall not be sufficient for the payment in full of the sum of Rs. 25,382-8-0 with interest, that being the amount for which the personal decree was passed, then the defendant should pay to the plaintiff the amount of the deficiency together with the plaintiff's costs. The decree is in a sense peculiar, and that has led to a contention before us on the part of the respondents that it does not come within the provisions of the Transfer of Property Act in general or of sections 88 and 89 in particular. No doubt, if those sections be read literally, that is so. On the other side, it is contended that the decree comes within the provisions of the Transfer of Property Act, and it is on that ground principally that it is contended in the light of the cases that the present application is not barred.

For the purpose of my judgment, I will assume that this decree is within the Transfer of Property Act, and I prefer

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to put it on that broad ground rather than to seek minute distinctions, though I can quite see that the decree does encourage the distinctions which have been suggested.

Now, if it be a decree, as the appellant before us contends, under section 88, of the Transfer of Property Act, then no further decree was requisite. All that was required was, under section 89, an order for sale. It is no use our looking into expressions in the cases, for the purpose of determining this; the Act itself is clear and plain. It is provided in section 88 that there shall be a decree for sale. Section 89 provides that if the payment contemplated by the decree, is not made, the plaintiff or the defendant, as the case may be, may apply to the Court for an order absolute for sale of the mortgaged property, and the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in section 88, and thereupon the defendant's rights to redeem, and the security, shall both be extinguished. Now, what is the nature of an order for sale? In *Harendra Lal Roy Chowdhri v. Maharani Dasi* (1), there was a decree for sale, substantially as here, and the respondents in that case, the mortgagors, being in default, the appellants petitioned for an absolute order for sale. Lord Davey in disposing of the case, says in the course of his judgment, "under the circumstances, it is not surprising that the respondents were not able to find the money on the stipulated day; and thereupon the present appellant presented a petition for realization of his entire decree by sale of the mortgaged properties." He goes on to say, in describing what had been done by the learned Subordinate Judge who acceded to the application:—"The learned Subordinate Judge in the first instance gave the appellant execution for the whole amount of his decree." So it appeared to the Privy Council in that case, that an application for an order for sale was a petition for realization by the mortgagee of his decree.

Now, this case falls within the provisions either of Article 183 or Article 181 of the Limitation Act; it does not

(1) (1901) I. L. R. 28 Calc. 557; L. R. 28 I. A. 89, 97.



fall within the provisions of Article 182. Article 183 deals with an application "to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction or an order of His Majesty in Council," and provides a period of twelve years from when "a present right to enforce the judgment decree or order accrues to some person capable of realising the right." If this case comes within Article 183, it is free from the embarrassment of the conflicting decisions under Article 182. If, and so far as this can be regarded, in the words of Lord Davey as "an application for realization of a decree," it is not unfair to say that it is an application *to enforce a judgment*, as being either a proceeding in execution or a proceeding for judicial relief under a decree. I therefore see no reason why Article 183 should not apply. If that be so, then it follows that this application is out of time.

I do not propose to make more than a passing reference to the argument that has been addressed to us in relation to Article 181.

There have been brought to our notice numerous cases on Article 181 and Article 182 or more strictly speaking on Articles 178 and 179 of the former Limitation Act, with a view to showing that these Articles did not apply in the past to an application under section 89 of the Transfer of Property Act, and that by parity of reasoning they could not govern applications under the substituted provisions of order XXXIV of the Code of Civil Procedure. One object in view when the present Code was passed was to end, as far as possible, the conflict of decisions which embarrassed the Courts, and among those conflicting decisions were those which dealt with two points:—*First*, whether an application for an order under section 89 of the Transfer of Property Act was an application in execution or not; and, *secondly*, whether, if it was not an application in execution, Article 181 constituted a bar on the ground that the application was one not contemplated by the Code of Civil Procedure. And so it is now provided that the application which follows a preliminary decree for sale, is

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not for an order for sale, but for a decree for sale. And with the same end in view the provisions as to mortgage suits have been removed from the Transfer of Property Act to the Civil Procedure Code, so that it is no longer possible to contend that these applications are not under the provisions of the Civil Procedure Code. I am aware that there is an opinion expressed in *Madhab Mani Dasi v. Lambert* (1), which it may be difficult to reconcile with this, but it is not a decision, for as I read the judgment in that case, the learned Judges expressly refrained from deciding the point which was a necessary preliminary to its becoming a point calling for actual decision. It could only have been a point for decision if it had been decided that the new Code applied. But the learned Judges not only expressly refrained from deciding this, but in effect negatived the view that the case fell under the new Code, for in conformity with the terms of the application out of which the appeal arose they determined that there should be an *order* absolute and not a final *decree* for foreclosure.

The result is that, for the reason which I have indicated in the earlier part of my judgment, I think Mr. Justice Fletcher rightly decided that the present application was barred, and that, therefore, this appeal should be dismissed with costs: Mr. U. L. Bose is entitled to a separate set of costs.

WOODROFFE J. I agree.

*Appeal dismissed.*

Attorney for the appellant: *B. Srimani.*

Attorney for the respondent: *U. L. Bose.*

C. E. B.

(1) (1910) I. L. R. 37 Calc. 796; 15 C. W. N. 337.

## APPELLATE CIVIL.

*Before Mr. Justice Holmwood and Mr. Justice D. Chatterjee.*

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*Mortgage—Sale—Purchase by mortgagee—Subsequent purchase by landlord—Mortgage-encumbrance—Mortgagee-purchaser, rights of, to fall back on mortgage—Sale under Bengal Tenancy Act—Ordinary Court-sale, its effect—Decree for rent against real tenant, effect of—Bengal Tenancy Act (VIII of 1885), ss. 164, 165 and 167.*

Where the mortgagee of a tenure purchased the mortgaged property in execution of a decree on his own mortgage, and the landlord subsequently purchased the same property in execution of a rent-decree but did not annul the mortgage-encumbrance:—

*Held*, that the mortgagee-purchaser was entitled to fall back on his mortgage as a shield against the purchase by the landlord.

*Akhoy Kumar Soor v. Bejoy Chand Mohatap* (1), followed and the *obiter dictum* in the case discussed.

*Bhawani Koer v. Mathura Prasad* (2), referred to.

*Held*, further, that the landlord could not oust the mortgagee from the tenure without annulling the encumbrance under section 167 of the Bengal Tenancy Act, and this would be so even if the mortgagee had not proceeded to sale before the purchase of the landlord.

Where the bidding for a tenure put up to auction under section 164 of the Bengal Tenancy Act did not reach the level of the decretal amount, and a sale of the tenure subsequently followed, but without a second proclamation as contemplated by section 165 of the same Act, the sale must be held to have been an ordinary court-sale and the purchaser to have acquired only the right, title and interest of the judgment-debtor.

*Nazir Mahomed Sirkar v. Girish Chunder Chowdhuri* (3) and *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (1), distinguished.

The special provisions for the sale of tenures under the Bengal Tenancy Act are a part of the public policy intended for the benefit of all parties concerned and the results of such sales are generally destructive of various derivative rights belonging to third parties not

\* Appeal from Original Decree, No. 183 of 1909, against the decree of Srihari Lahiri, Subordinate Judge of Hooghly, dated March 29, 1909.

(1) (1902) I. L. R. 29 Calc. 813. (2) (1907) 7 C. L. J. 1, 20.

(3) (1897) 2 C. W. N. 251.

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before the Court. The provisions of the Act are therefore very stringent, and if the landlord wants the special results provided for by the Act, he must proceed strictly in accordance with its provisions.

Where a suit for rent has been rightly brought against the real tenant and a decree has been obtained, the decree is a good decree for rent, whether the tenant was recognised as such or not.

*Ranee Lalun Monee v. Sona Monee Dabee* (1) and *Surnomoyee v. Denonath Gir Sunmyasee* (2), referred to.

APPEAL by Raja Banbihari Kapur, the defendant No. 1.

The allegations in the plaint were that one Ballavlal Barman, grandfather of defendant No. 2, held *istimrari taluk* Konarpur, under the Maharaja of Burdwan, at a rental of Rs. 330-12 as, 1 ganda; that Ballavlal Barman, by a deed of sale dated the 25th Kartik 1264 B.S., conveyed it away to his wife Radhamani Bibi, who remained in possession of the *taluk* in her own right, though the name of her husband continued in the landlord's *sherista*; that the defendant No. 1, who had acquired the *taluk* from the Burdwan Raj, and his agents were aware of Radhamani's purchase, and defendant No. 1 got a *kistibandi* mortgage-bond executed by Radhamani Bibi on the 14th Paus 1301, on account of arrears of rent; that Radhamani Bibi made payments in part-satisfaction of this bond-debt; that Radhamani Bibi borrowed Rs. 1,499 and Rs. 999 from the plaintiffs on the 22nd Agrahayan 1301, and the 15th Jaistha 1303, and executed bonds mortgaging this *taluk*; that to avoid these mortgages the defendants No. 1 obtained a fraudulent rent decree against the defendant No. 2; that the plaintiffs on the 26th February 1902 obtained a decree upon the two mortgage bonds against defendant No. 2, he being the representative of Radhamani and in possession of the property, and in execution of the decree purchased the property themselves for Rs. 3,600 on the 15th September 1903; that the defendant No. 2, instituted proceedings under sections 108, 244 and 311 of the Code of Civil Procedure, 1882, and the litigation went up to the High Court, but he was unsuccessful; that a collusive rent suit was brought by defendant No. 1 on the 10th April 1902, and it was decreed *ex parte*; that the rent decree was

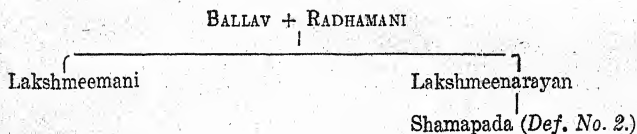
(1) (1874) 22 W. R. 334.

(2) (1883) I. L. R. 9 Calc. 903.

executed and the *taluk* was advertised for sale, that though the plaintiffs were willing to pay the decretal money, the sale was postponed from time to time to put the plaintiff off the scent, and at last the execution case allowed to be struck off; that the decree was again executed in 1903 and on the 9th February 1904, the defendant No. 1 purchased the property, in the absence of the plaintiffs or any *bonâ fide* bidders, for Rs. 800 only; that the plaintiffs preferred objections under sections 311 and 244 of the Code of Civil Procedure, but they were unsuccessful, and that the defendant No. 2 subsequently took a lease of that property from the defendant No. 1 in the name of the defendant No. 3. The plaintiffs therefore brought this suit for recovery of possession and *vasilat* and for a declaration that the rent decree and sale were fraudulent.

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The following genealogical table will explain some of the principal facts of the case:—



Defendant No. 2, who was admitted by all parties to be the tenant in possession at the time of the mortgage and rent suits did not appear though served in the notice of the suit.

Defendant No. 3 was really the tenant in the land in dispute, he having taken a lease from defendant No. 1.

The main objections of the contending defendants were that the suit was barred under the provisions of sections 244 and 13 of the Code of Civil Procedure of 1882; that the suit was not maintainable in the form in which it was presented; that Shamapada was not the heir of Radhamani but Lakshmeemoni was; that Radhamani had no right or possession in the property in dispute; that the *kabala* of the 25th Kartik, 1264, was not a genuine document; that the mortgage-bonds in favour of the plaintiffs were collusive and fraudulent and were executed without legal necessity; that the mortgage-decrees obtained by the plaintiffs could not bind the estate, and that the sale in execution of the rent-decrees, which were perfectly



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legal and valid, should prevail over the sale in execution of the mortgage-decrees. The defendants also denied all the statements of facts of the plaintiffs.

The Subordinate Judge held that section 244 (c) of the Civil Procedure Code did not apply to a case where the judgment-debtor or his representative-in-interest tried to set aside the effect of the decree, as an execution Court is not competent to question the validity of a decree and that section 13 also had no application, as in the proceeding under section 244 the validity of the decree was not in issue. He held, further, that though Shamapada was not the heir of Radhamani, the mortgage-decree would bind the property, as Shamapada was the tenant then in possession, that Radhamani was the real owner after Ballay, that the purchase of the plaintiff was valid and that the rent-decree was fraudulent, illegal and void. In the result, the suit was decreed in full by the Subordinate Judge.

Defendant No. 1 thereupon appealed to the High Court.

*Babu Basanta Kumar Bose* (with him *Babu Shorashi Charan Mitra*), for the appellant. On the evidence on record, it is quite plain that the sale in execution of the rent-decree was not fraudulent. There was the arrears of rent to be sure, and the Raja proceeded all along legally. On the contrary, the plaintiffs' actions with regard to the rent-decree obtained by us were unjust and vexatious. Shamapada was not the heir of Radhamani. Her decree against Shamapada is of no consequence, even if the mortgage-decree is valid. As purchasers in a rent-decree, we have a superior title.

*Mr. S. P. Sinha* (with him *Babu Dwarkanath Chakravarti* and *Babu Saratkumar Mitra*) for the respondents. It is idle to deny the rights of Radhamani. The Raja admitted it in the instalment-bond. The conduct of the plaintiffs is quite justifiable. If we read the evidence carefully we cannot resist the conclusion that the sale in execution of the rent-decree was fraudulent.

*Babu Dwarkanath Chakravarti* (on the same side). The so-called 'rent-decree' cannot have the force of a rent-decree. The bidding at the first sale was far below the decretal amount.



The final sale was not preceded by a proclamation. By this latter sale, therefore, the decree-holder purchased only the right, title and interest of the judgment-debtor: *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (1). The *obiter dictum* in this case is inconsistent with the main judgment and not good law. The rent-decree was plainly obtained in collusion with the tenant: see *Ram Saran Das v. Ram Pergash Das* (2).

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The mortgages in favour of the plaintiffs were genuine. The Raja (defendant No. 1) did not annul the encumbrance. The mortgage lien is alive: *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (1), *Surjiram Marwari v. Barhamdeo Persad* (3). On the question of the mortgage-suit being brought against Shamaprasad, the Raja also brought it against him. He was the tenant in possession. That is enough for our purpose. Radhamani must be held to be the representative in interest of Ballav: *Prosunno Chunder Bhattacharjee v. Kristo Chytunno Pal* (4). It is too late now to deny this.

*Babu Shorashi Charan Mitra*, in reply. By the rent-sale, the Raja obtained absolute interest in the property, though from the sale-certificate it appears to be otherwise as pointed out by your Lordships: see *Nazir Mahomed Sirkar v. Girish Chunder Chowdhuri* (5) and *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (1).

*Cur. adv. vult.*

HOLMWOOD AND D. CHATTERJEE, JJ. One Ballav Lal Barman was the holder of a permanent tenure under defendant No. 1 and his predecessor in interest. In 1857 Ballav Lal executed a *kabala* in respect of this tenure in favour of his wife Radhamani. Ballav Lal, however, continued as the registered tenant until his death in 1891 or thereabout. He was succeeded by his grandson Shyama Prosad who was a minor at the time living under the guardianship of his grand-mother Radhamani and mother Kali Moti. The collections in the moffusil were made in the name of Radhamani and she mort-

(1) (1902) I. L. R. 29 Calc. 813. (3) (1905) 2 C. L. J. 202.

(2) (1905) I. L. R. 32 Calc. 283. (4) (1878) I. L. R. 4 Calc. 342.

(5) (1897) 2 C. W. N. 251.

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gaged the tenure to the plaintiffs on the 7th December, 1894, for Rs. 1,499. About three weeks after this on the 28th December, 1894, defendant No. 1 took from Radhamani a *kist-bandy* bond for the arrears due on the tenure. In this document Radhamani described her title under the purchase of 1857, and it can hardly be argued that the effect of the acceptance of that document was not to recognise Radhamani as the tenant of the mehal. On the 27th May, 1896, Radhamani executed another mortgage of the tenure in favour of the plaintiffs who brought a suit upon the two mortgages against Shyama Prosad as heir and grandson of Radhamani and in possession of her estate and obtained an *ex parte* decree on the 26th February 1902. Defendant No. 1 in April 1902, brought a suit for arrears of rent against Shyama Prosad stating that Ballav Lal was the recorded tenant and Shyama Prosad was in possession of the tenure, and obtained an *ex parte* decree on the 21st June, 1902. The plaintiffs executed their mortgage decree and purchased the mortgaged property on the 15th September, 1903, for Rs. 3,600. Defendant No. 1 executed his rent-decree and himself purchased the property in arrear on the 9th February, 1904, for Rs. 800. The plaintiffs applied for setting aside the sale on the ground of fraud and irregularities, but were not successful. They bring the present suit on the ground that the decree itself was fraudulent as well as the sale, and pray for recovery of khas possession on the declaration that their rights were not affected by the sale.

The Lower Court has given the plaintiffs a decree holding that the decree for rent was fraudulent and collusive. Defendant No. 1 has appealed, and on his behalf it has been contended that the finding of fraud is not supported by the evidence in the case. It is quite clear that the findings of fact arrived at by the learned Judge do not make out any case of fraud against defendant No. 1. It is not alleged or shown that there was no arrear due on the tenure and there is no evidence that defendant No. 1 did anything in respect of the suit that he was not entitled to do under the law. It does not also appear that he had any duty to perform towards the plaintiffs

the breach of which would throw any discredit upon him. We think the finding of fraud is wrong and must be set aside.

The decree of the Lower Court, however, has been supported on the ground that the decree obtained by defendant No. 1 was not a rent decree under the Bengal Tenancy Act, and in any case the sale brought about by him was not in respect of the tenure but only the right, title and interest of Shyama Prosad, so that their rights as purchasers under the mortgage decree were not affected. It has been further contended that the mortgage lien exists notwithstanding the sale, and as no notice under section 167 of the Bengal Tenancy Act has been served, the Raja defendant No. 1, was not entitled to  *khas*  possession.

With regard to the first point we have seen that defendant No. 1 recognised Radhamani as his tenant by accepting from her the instalment bond for rent. She was, therefore, his recognised tenant from 1301. Upon her death no one took any steps to register himself or herself as her representative. If her purchase was a  *bona fide*  one, her daughter Lakhimoni, who was alive at the time of the rent suit, was her legal representative, if she was a  *benamdar*  for her husband then Shyama Prosad was the rightful heir. In any case Lakhimoni was not in possession and Shyama Prosad was sued as the party in possession and there is no dispute that he was really in possession. In fact, no claim has ever been made on behalf of Lakhimoni and both the contending parties have treated Shyama Prosad as the tenant in possession and the question of  *benami*  has not been pressed by either party. The suit for rent was, therefore, rightly brought against Shyama Prosad who must be taken as the real tenant. It has been contended that as Shyama Prosad was not recognised as the tenant but was sued merely as he was in possession, the decree obtained is a money decree for compensation for use and occupation. That would have been a legitimate view to take if as a matter of fact Shyama Prosad had not been the real tenant: see  *Ranee Lalun Monee v. Sona Monee Dabee*  (1);  *Surnomoyee v.*

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 BANBIHARI was a good decree for rent.

KAPUR v. As regards the second point, it appears from the order  
 KHETRA PAL sheet in the execution case in which defendant No. 1 made his  
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 simultaneously, evidently under section 163, clause 1, of the  
 Bengal Tenancy Act. It may be presumed that clause 2 (a)  
 of that section was also complied with. As the sale took place  
 on the first day of sale, the sale could be held under section  
 164 only, subject to registered and modified incumbrances if  
 the bidding were sufficient to liquidate the whole amount of  
 the decree and the costs. The bidding, however, did not reach  
 the level of the decretal amount and was in fact several hun-  
 dred rupees less; so that the sale could not be held under sec-  
 tion 164, and as there was no second proclamation and sale as  
 contemplated by section 165, the sale cannot be taken as one  
 held under the Bengal Tenancy Act. The provisions of the  
 Bengal Tenancy Act regarding sales are very stringent and  
 the results are generally destructive of various derivative  
 rights belonging to third parties not before the Court. The  
 State enforces its claims for revenue under the stringent pro-  
 visions of the sunset law from the *zemindars* and has enacted  
 the stringent provisions of the tenancy laws for enabling the  
*zemindars* and other landlords to realise rents from their ten-  
 ants, providing safeguards for the protection of the tenants  
 and those that deal with them. The special provisions for the  
 sale of tenures are a part of a public policy intended for the  
 benefit of all parties concerned. If the landlord wants the  
 special results provided for by the Act, he must proceed strict-  
 ly in accordance with its provisions. We think he has not  
 done this in this case and he cannot, therefore, claim rights  
 superior to those of an ordinary purchaser at a Civil Court  
 sale. His sale certificate also supports this view as he is  
 certified to have purchased the right, title and interest of the  
 judgment-debtor. The learned vakil for the appellant has re-  
 ferred us to two cases in this connection: *Nazir Mahomed Sir-*



*kar v. Girish Chunder Chowdhuri* (1), and *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (2).

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These cases are clearly distinguishable; in the first case the property sold was described as the tenure and the proclamation was for the sale of the tenure under section 59 of Act VIII of 1869 B. C. The learned Judges say "the property advertised was the tenure and the property sold was the tenure, according to the sale certificate, and the mere insertion of a statement that the sale was of the rights and interests of the judgment-debtors would not, we think, have the effect under the circumstances stated of limiting the sale to such rights and interests and not extending it to the tenure itself."

In the second case the description of the property ended with the words "the said lot in arrears," so that the facts are not similar. It was argued in that case that the property should have been put up first subject to registered and notified incumbrances and afterwards with power to avoid all incumbrances, but this argument was met by the remark that the mortgage in question in that case was not a registered and notified incumbrance. The report does not show under what section the sale took place or whether the amount of the bidding was sufficient to meet the decree with costs. Under the circumstances we do not feel in any way hampered by that decision.

As regards the third point, the argument of the learned vakil for the respondent is that notwithstanding the decree and sale, he is still entitled to fall back upon his mortgage lien to defend himself from the attack of defendant No. 1 who claims to oust him. In the case of *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (2) hereinabove quoted, the mortgagee obtained his decree absolute in May 1892. The Maharaja brought his suit for arrears in 1893 and purchased the "lot in arrear" in 1893. The mortgagee then applied for executing his mortgage decree against the Maharaja as purchaser in 1901. The Maharaja then applied for the service of notice under

(1) (1897) 2 C. W. N. 251.

(2) (1902) I. L. R. 29 Calc. 813.

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section 167 and the learned Judges held that as this application was not made within the time limited by Section 167 it was barred and the mortgagee was entitled to execute his decree against the mortgaged portion of the tenure. The result of this ruling is, that the incumbrance of the mortgage was in existence notwithstanding the decree absolute on the mortgage. There is, however, an *obiter dictum* in the case that after the mortgage had culminated in a decree there would be no incumbrance to annul under section 167; in the first place the learned Judges say it is not necessary to decide that question and in the second place that opinion is quite inconsistent with the decision on the point of limitation under section 167; for if there was no incumbrance there was nothing to annul and no application for annulment could be barred. In the case of *Bhawani Koer v. Mathura Prasad* (1) a revenue sale of an estate under section 54 of Act XI of 1859 took place after a mortgagee had purchased in execution of a mortgage decree of his own and after the sale had been confirmed. The revenue sale was subject to all incumbrances. The Court held that the mortgagee-purchaser was entitled to fall back on his mortgage as a shield against the purchaser at the revenue sale. In the present case if the plaintiff had not proceeded to sale before the purchase of defendant No. 1, the latter would have been at best entitled to annul the plaintiff's incumbrance under section 167; there is no reason why he should be in a worse position by reason of his diligence in proceeding to sale first. It is true he could have paid up the decree of the defendant and saved himself from this tortuous litigation, but he was not bound to do that. He was not liable for the rent before his purchase and his remedy over, if any, against his mortgagor by way of contribution might be an illusory remedy after all. In any case he is entitled to rely on all defences legitimate to his juridical position, and we think that the Raja defendant was, even if he had taken all proceedings according to law, not entitled to oust him without annulling his incumbrance

(1) (1907) 7 C. L. J. 1, 20.



under section 167 of the Bengal Tenancy Act, and this has not been done in this case.

Under these circumstances although we set aside the judgment of the Court below, we confirm the decree of the said Court but without costs in either Court.

S. M.

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## CRIMINAL REVISION.

*Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.*

JOYMANGAL PERSHAD NARAIN SINGH

v.

JHAGROO SAHU.\*

1911

July 17.

*Criminal Revision—Practice—Jurisdiction of High Court—Rule issued on one or more of several grounds in a petition, and ultimately discharged—Fresh Rule on the other grounds of the same petition.*

When a rule has been granted on one or more of several grounds contained in a petition and is ultimately discharged, the High Court has no jurisdiction to issue a fresh rule, in the same case, on the other or some of the other grounds of the petition, which were considered on the first occasion, unless permission was given to the party, at the time of the discharge of the first rule, to renew the application on the other grounds or some of them.

*Rai Radha Gobind v. Gossain Mohendra Gir (1) and Bibhuty Mohan Roy v. Dasimoni Dassi (2) referred to.*

On 5th September 1910, a proceeding under s. 145 of the Criminal Procedure Code, was drawn up by Babu P. N. Mookjee, Deputy Magistrate of Hazaribagh, against Jhagroo Sahu, as first party, and the petitioner, Raja Joymangal Pershad Narain Singh and others, as second party, in supersession of a previous proceeding under s. 144 of the Code based on a petition by the first party. On the 30th November, Babu H. P. Ghose, another Deputy Magistrate, took the case on his own file, and after taking evidence declared the first party to be in possession, by his order dated the 13th February

\* Criminal Revision, No. 546 of 1911, against the order of Haripada Ghose, Deputy Magistrate of Hazaribagh, dated Feb. 13, 1911.

(1) (1901) 6 C. W. N. 340.

(2) (1902) 10 C. L. J. 80, 82.

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1911. The second party thereupon filed a petition, by way of motion, containing the following among other grounds:—

(i) That a proceeding having been initiated only on the allegation of the first party, and there being nothing beyond the bare statement of the said party to show the existence of a likelihood of a breach of the peace, the Deputy Magistrate acted without jurisdiction in initiating the proceedings.

(ii) That Babu H. P. Ghose had no jurisdiction to remove the case from the file of the Magistrate who had initiated the proceedings.

(iv) That the Magistrate having considered, at length, the merits of the claims of the parties, found that the possession of the first party was precarious, and that he was in possession immediately before the dispute, but that he did not find which party was in possession at the date of the dispute or within two months immediately preceding.

The High Court (Holmwood and Sharfuddin JJ.) issued a Rule only on the ground relating to the jurisdiction of Babu H. P. Ghose to remove the case from the file of the first Magistrate. The Rule was discharged, on 12th May 1911, by Caspersz and Sharfuddin JJ. The petitioner again moved the Court for a fresh Rule on the same facts and the same grounds, other than that on which the first Rule had been issued, and their Lordships (Caspersz and Sharfuddin JJ.) granted a Rule, on the 1st and 4th grounds set forth above, by their order dated the 15th May 1911.

*Mr. A. Sharfuddin and Moulvi Enayet Kareem*, for the petitioner.

*Mr. K. N. Chaudhuri and Babu Lalit Mohan Mukerjee*, for the opposite party.

CASPERSZ AND SHARFUDDIN JJ. On the 12th May 1911, this Court discharged a Rule obtained (by the petitioner) upon the sole ground whether a certain Deputy Magistrate had jurisdiction to remove a case from the file of another Deputy Magistrate. Other grounds had been taken in that application, but this Court (Holmwood and Sharfuddin JJ.) gave a Rule on the one ground only. Nothing was said, in this Court's judgment, as to whether the petitioner had the Court's permission to renew his application on the other grounds on which that Rule had not been issued.

On the 15th May 1911, we granted another Rule upon the first and fourth grounds specified, which had reference to

matters other than the question of jurisdiction of one Deputy Magistrate to transfer proceedings from the file of another Magistrate. These grounds go much deeper into the merits of the controversy between the parties, and, undoubtedly, challenge the jurisdiction of the Deputy Magistrate to pass an order declaring the opposite party to be in possession of the property in dispute.

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On the Rule coming on for hearing, the learned counsel for the opposite party contended that this Court had no jurisdiction to grant a fresh Rule when, upon the previous occasion, the whole matter was before the Court and a Rule was granted on one only of the several grounds. We think this contention is well-founded.

The first case relied upon, *Rai Radha Gobind v. Gossain Mohendra Gir* (1), may, perhaps, be distinguished in one respect, that is to say, the two Rules granted in that case, one after another, were in similar terms. In that case, however, the petitioner obtained liberty to apply for another Rule if so advised, and so the authority is in point, because the present petitioner never applied for, nor obtained permission to ask for another Rule. The other case cited to us, *Bibhutya Mohan Roy v. Dasimoni Dassi* (2), dealt with a case that had not been heard and determined on the merits. In such a case the Court has power to re-open, and dispose of, the matter; but it cannot be said, in the present instance, that the first Rule was not decided on the merits. The points selected by this Court, for hearing and determination, was the one point we have mentioned and that Rule was disposed of on that particular question. The second authority cited to us is, undoubtedly, in favour of the contention of the opposite party.

We understand that, as a matter of practice, when a Rule is issued by this Court on one or more selected grounds, no further application can be granted on the remaining grounds not so selected. We think this is a salutary practice and one to be followed on principle as well. The preliminary objection prevails. The rule is discharged.

E. H. M.

*Rule discharged.*

(1) (1901) 6 C. W. N. 340.

(2) (1902) 10 C. L. J. 80, 82.

## APPELLATE CIVIL.

*Before Mr. Justice D. Chatterjee and Mr. Justice N. R. Chatterjee.*

1911

July 20.

LAKSHMI CHARAN SAHA

v.

NUR ALI.\*

*Fraud—Ex parte decree procured by fraud—Jurisdiction of another Court to set aside the ex parte decree—Investigation how far limited.*

The defendant obtained an *ex parte* decree at Akyab upon a promissory note against the plaintiff who subsequently applied under section 108 of the Code of Civil Procedure to set aside the said decree. The *ex parte* decree was set aside and the suit was revived, but at the hearing the plaintiff could not appear and an *ex parte* decree was again passed.

The plaintiff then brought a suit in the Court to which the *ex parte* decree was transferred for execution, for a declaration that the said decree was not binding on him, it being based upon no cause of action and being fraudulent, inasmuch as he did not execute any promissory note in favour of the defendant, or receive any money from him. On an objection by the defendant that the Court had no jurisdiction to enter into the merits of the suit in the Akyab Court, and in any case the only matter that could be investigated was whether the plaintiff had by the action of the defendant been prevented from placing his case properly before the said Court:—

*Held*, that the jurisdiction of the Court in trying a suit of this kind was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree.

SECOND APPEAL by the defendants, Lakshmi Charan Saha and another.

This appeal arose out of an action brought by the plaintiff for a declaration that the decree obtained by defendant No. 1 against him was not binding upon him as being fraudulent. It appeared that on the 1st of May, 1906, defendant

\* Appeal from Appellate Decree, No. 1908 of 1909, against the decree of T. C. Das, Subordinate Judge of Chittagong, dated June 9, 1909, affirming that of Nagendra Nath Bhattacharya, Munsif of Hathazari, dated Jan. 25, 1909.



No. 1, Ismat Ali, obtained an *ex parte* decree based upon a promissory note against the plaintiff in the Court of the District Judge of Akyab. The decree was then transferred to the Court of the Munsif of Hathazari in the district of Chittagong, for execution. The plaintiff having come to know of this, made an application under section 108 of the Civil Procedure Code, 1882, to set aside the *ex parte* decree. The application was granted and the case was revived. On the date of hearing, the plaintiff could not appear and an *ex parte* decree was again passed. A notice having been served on him, the plaintiff came to know that the defendant No. 1 had again secured against him a fraudulent *ex parte* decree in collusion with defendant No. 4, to whom the decree was transferred by defendant No. 1. On this state of facts the plaintiff brought, in the Munsif's Court at Hathazari, this action for the aforesaid declaration alleging that he did not borrow any money from the defendant No. 1 on a promissory note at Akyab, and that the *ex parte* decree and the subsequent proceeding taken by the defendant No. 1 were all collusive and fraudulent.

The defendants Nos. 1 and 4 contested the suit and pleaded, *inter alia*, that the suit was not maintainable in the Hathazari Court, and that the decree was not fraudulent. The Court of first instance overruled the objections of the defendants and decreed the plaintiff's suit. On appeal by the defendants, the learned Subordinate Judge of Chittagong affirmed the decision of the Court of first instance.

Against this decision the defendants appealed to the High Court.

*Babu Dharendra Lal Khastgir* (with him *Babu Khiteesh Chunder Sen*), for the appellants. Plaintiff brought this suit to set aside the decree of the District Judge of Akyab on the ground that the promissory note was a forged document and that he did not borrow any money. He had notice of the suit in Akyab, but he did not choose to contest it. The District Judge of Akyab found on the evidence that the promissory note was genuine and that money was due on the note and passed a decree. The Munsif's Court at Chittagong had no

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jurisdiction to enter into the question of the genuineness of the promissory note, which was found in favour of the present defendant by a competent Court. Plaintiff was not prevented by any fraud on the part of the defendant No. 1 from putting his case properly before the Akyab Court. The decision of the Akyab Court was not set aside by any Court having authority over the said Court. The cases of *Mahomed Golab v. Mahomed Sulliman* (1), and *Abdul Huq Chowdhry v. Abdul Hafez* (2), show that the lower Court had no jurisdiction to go into the merits of the suit in the Akyab Court, and in any case the only matter that could be investigated was, whether the plaintiff had, by the action of defendant No. 1, been prevented from placing his case properly before the Akyab Court. The Chittagong Court had no jurisdiction to set aside the decree of the District Judge of Akyab. Further, the promissory note should have been produced before the Chittagong Court, as without it, the Court could not have pronounced any opinion about its genuineness.

*Moulvi Syed Shamsul Huda* (with him *Moulvi Abul Ahsan*), for the respondent. The Court below having found that the plaintiff never went to Akyab, and that he did not borrow any money from the defendant No. 1, it was fully justified in making a declaration that the decree was a nullity, and that it was not binding on the plaintiff. A suit will lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant upon the Court by committing deliberate perjury and by suppressing evidence: *Venkatappa Naick v. Subba Naick* (3). In cases of fraud there is no limitation to the jurisdiction of the Court.

*Babu Dharendra Lal Khastgir*, in reply.

*Cur. adv. vult.*

D. CHATTERJEE J. The defendant No. 1 obtained at Akyab an *ex parte* decree upon a promissory note said to have been executed by the plaintiff at Akyab. The plaintiff had the decree set aside under section 108 of the Civil Procedure Code,

(1) (1894) I. L. R. 21 Calc. 612. (2) (1910) 14 C. W. N. 695.

(3) (1905) I. L. R. 29 Mad. 179.



but could not appear at the hearing of the revived suit so that an *ex parte* decree was again passed. The result is analogous to a case in which there is an *ex parte* decree after actual service of summons. The plaintiff brings the present suit on the allegation that he never went to Akyab, never received any money there from the defendant and never executed any promissory note in his favour, so that the decree was based on no cause of action and fraudulent, and praying for declarations to that effect. The lower Courts have held that the plaintiff never went to Akyab, never received any money from the defendant No. 1 there, and never executed the promissory note so that the whole proceeding was fraudulent. It has been argued in second appeal before us that the lower Court had no jurisdiction to go into the merits of the suit in the Akyab Court, and in any case the only matter that could be investigated was whether the plaintiff had by the action of the defendant No. 1 been prevented from placing his case properly before the Akyab Court, and, secondly, that no decree should have been passed without calling for the promissory note impeached as a forgery.

In support of the first contention, the learned vakil for the appellant has relied upon the cases of *Mahomed Golab v. Mahomed Sulliman* (1) and *Abdul Huq Chowdhry v. Abdul Hafez* (2). In the first case, it appears to have been laid down by Sir Comer Petheram C.J. "that where a decree has been obtained by a fraud practised upon the other side by which he was prevented from placing his case before the tribunal, which was called upon to adjudicate upon it in the way most to his advantage, the decree is not binding upon him, . . . and. . . it is not the law that because a person against whom a decree has been passed alleges that it is wrong and that it was obtained by perjury committed by, or at the instance of, the other party, (which is, of course, fraud of the worst kind), that he can obtain a re-hearing of the questions in dispute in a fresh action by merely changing the form in which he places it before the Court." Mr. Justice Ghose agreed in the result on the

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ground that no fraud had been proved. The second case followed the above opinion. I think the proposition of law as laid down in these cases has the effect of restricting within too narrow limits the remedy of a man against whom a fraudulent decree has been obtained. It becomes necessary, therefore, to examine the authorities upon which those cases are based with some care. I may say at the outset that the opinion by Sir Comer Petheram, C.J. in the first case is an *obiter dictum*, as there was no fraud found and Mr. Justice Ghose did not join in the said view, but rested his judgment simply on the ground that no fraud has been proved: that opinion again was based on an *obiter dictum* of Lords Justices James and Thesiger in the case of *Flower v. Lloyd* (1), Lord Justice Baggallay reserved his opinion as the point did not arise, and said "I should much regret to feel myself compelled to hold that the Court had no power to deprive the successful, but fraudulent party, of the advantages to be derived from what he had so obtained by a fraud." In the case of *Abouloff v. Oppenheimer & Co.* (2) Lord Justice Brett said, "With one exception none of the authorities cited before us in the least militate against our decision; they all seem to show that the fraud of a party to a suit is an extrinsic and collateral act which will vitiate the judgment. That exception is to be found in the doubts expressed by James L.J. with the assent of Thesiger L.J. in *Flower v. Lloyd* (1), it seems to me that the fraud alleged in that action was probably fraud on the part of certain servants of the party and not fraud brought home to the party himself. Moreover, it was, as I understand, fraud committed not before the Court itself at the trial of the action, but previously to the case being brought to a hearing before the Court. If it is to be taken that the doubts of James and Thesiger L.J. related to a fraud of a party to the action committed before the Court itself for the purpose of deceiving the Court, I cannot after having heard the present argument agree with the doubts expressed by them." In the case of *Priestman v. Thomas* (1), we find that a probate having been

(1) (1879) L. R. 10 Ch. D. 327. (2) (1882) L. R. 10 Q. B. D. 295, 307.

(3) (1884) L. R. 9 P. D. 210.

granted on a forged will after compromise, a suit was brought in the Chancery Division for a declaration that the will was a forgery and the compromise fraudulent. The Court held the will to be a forgery and set aside the compromise. In the case of *Vadala v. Lawes* (1), the plaintiff having recovered a decree in Italy upon certain Bills of exchange brought a suit in England upon the Italian judgment. The defence was that the judgment of the Italian Court was obtained by fraud, some forged bills were substituted for some genuine ones and that the plaintiff had fraudulently represented the bills to be commercial bills, when he knew they were not, and he thereby imposed on the Courts and obtained his judgment. At page 316 of the Report, Lord Lindley is reported to have said "But we come now to another and more difficult question, and that is, whether this defence can be gone into at all. There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule which is perfectly well established and well-known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign Court. But you have to combine these two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits." Their Lordships then discussed the case of *Abouloff v. Oppenheimer & Co.* (2), and followed it. In the case of *Cole v. Langford* (3), the plaintiff brought a suit for setting aside a decree obtained against him by the defendant by fraud in exhibiting to the Court and jury certain false and counterfeit documents and memorandum books containing false and fraudulent entries

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(1) (1890) L.R.25 Q.B.D.310, 316. (2) (1882) 10 Q. B. D. 295.

(3) [1898] 2 Q. B. 36.

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touching the matters in issue in the action. The defendant did not appear and the Court gave a decree. Mr. Justice Phillimore said "There are several cases since *Flower v. Lloyd* (1), in which this jurisdiction has been exercised notably in the case of *Priestman v. Thomas* (2)." As the authority on which the judgment of Sir Comer Petheram C.J. was based has never been recognised as an authority in England, I do not think I am bound by it or by any case based upon it. On the other hand, the case of *Radha Raman Shaha v. Prannath Roy* (3) is a sufficient authority for holding that such a suit as the present does lie. It is quite clear from the cases quoted above that the jurisdiction of the Court trying a suit of this kind is not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court can and must rip up the whole matter for determining whether there has been fraud in the procurement of the decree. As the lower Courts have found that the plaintiff never went to Akyab, never received money from the defendant, it follows that he never executed the promissory note which was alleged to have been executed at Akyab for money received at Akyab. The production of the promissory note was, therefore, immaterial. If the appellant had been advised that the promissory note would advance his case, he would have called for it, but he did not. And I do not think any useful purpose will be served by our remanding the case.

The learned vakil for the respondent also supported the decree of the lower Appellate Court on the ground that on the findings, the Akyab Court had no jurisdiction to try the case. Upon the view that I take of the law, however, on the main point I do not think it necessary to go into this question. The appeal is, therefore, dismissed with costs.

N. R. CHATTERJEE J. I agree.

S. C. G.

*Appeal dismissed.*

(1) (1879) L. R. 10 Ch. D. 327.

(3) (1901) I. L. R. 28 Cal. 475;

(2) (1884) L. R. 9 P. D. 210.

5 C. W. N. 757.

**Arbitration**—Award made after expiry of time fixed by Court—Application for enlargement of time to file award—*Civil Procedure Codes (Act XIV of 1882) s. 521 (c); (Act V of 1908) s. 148, Schedule II s. 15 (c).* An award was made after the time allowed by the Court had expired. On an application for enlarging the time for making such award:—*Held*, that the Court had no power to grant the application. *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar*, I. L. R. 13 All. 300, followed. *Held*, further, that where the time for making an award had expired, and no award had been made, section 148 of the Civil Procedure Code (Act V of 1908) gives the Court power to extend the time for the making of the award, notwithstanding that it had expired at the time of the application; but that section does not enable the Court to extend the time for the doing of a particular act, when in truth and in fact the act has already been done. *SHIB KRISHNA DAWN & Co. v. SATISH CHUNDER DUTT* (1911) I. L. R. 38 Cal. 522

**Arbitration by Court**—Submission of the questions in dispute to Court for determination—Award—Review—Appeal—Jurisdiction—*Civil Procedure Codes (Act XIV of 1882) s. 622; (Act V of 1908) s. 115.* When, after the hearing of a suit had commenced before a Munsif, both parties agreed to leave the questions in dispute between them to the determination of the Court after the Court had made a local inspection, and also agreed not to raise any objection to the same, or to prefer an appeal: *Held*, that the decision of the Munsif was in the nature of an award and that he could not alter the award when once made, or review his own decision. *Dutto Singh v. Dosad Bahadur Singh*, I. L. R. 9 Cal. 575, referred to. *Held*, further, that no appeal lay to the District Judge, and the order of the District Judge in

**Arbitration by Court—concl.**

entertaining the appeal and making the order of remand was without jurisdiction. *Sayad Zain v. Kalabhai*, I. L. R. 23 Bom. 752, followed. *Held*, further, that no appeal lay from the decision of the District Judge to this Court, but the High Court could interfere *suo motu* under s. 622 of the Civil Procedure Code (Act XIV of 1882) corresponding with s. 115 of the new Code (Act V of 1908). *BAIKANTA NATH GOSWAMI v. SITA NATH GOSWAMI* (1911) I. L. R. 38 Cal. ... 421

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—Right of reply—Duty of Appellate Court to determine accomplice character of Evidence—Criminal Procedure Code (Act V of 1898), s. 421—Practice. The Appellant has a right of reply to the Crown on the hearing of an appeal. *Promoda Bhusan Roy v. Emperor*, 11 C. W. N. xlii, followed. The Appellate Court is bound to find specifically whether witnesses said to be accomplices are so or not, and to weigh their evidence accordingly. *AMANAT SARDAR v. NAGENDRA BISWAS* (1910) I. L. R. 38 Calc. ... 307

—Second Appeal, if it lies from an order passed under o. XXI, rr. 89 and 92 of the Code of Civil Procedure, 1908—Civil Procedure Code (Act V of 1908), ss. 2, 49, 104 (2); o. XXI, rr. 89-92; o. XLIII, r. 1 (j)—Civil Procedure Code (Act XIV of 1882), ss. 310A, 312, and 588. No second appeal lies from an order passed in first appeal from an order under rule 89 or 92 of order XXI of the Code of Civil Procedure, 1908. Section 104, sub-section (2) of the Code of 1908 takes away the right of second appeal where a second appeal could lie in cases under section 310A read with section 244

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of the Code of 1882. *ASIMADDI SHEIKH v. SUNDARI BIBI* (1911) I. L. R. 38 Calc. ... 339

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—Power to alter conviction under s. 147, Penal Code, to one under s. 323, when the common object charged was other than to cause hurt—Issue of Rule and order for bail by the High Court—Duty of the Magistrate on receiving intimation of the same by telegram from Counsel—Delay in transmitting the Bail orders—Criminal Procedure Code (Act V of 1898), s. 423. The Appellate Court cannot alter a conviction of rioting under s. 147 of the Penal Code, with the common object to eject the complainants from their homestead lands, to one under s. 323 thereof. When a Rule is issued by the High Court and the proceedings stayed, and, *a fortiori*, when an order for bail is made, the Magistrate, on receiving reliable information thereof, such as a telegram from the counsel in the case, is bound to act on it immediately, though he has not received the High Court's orders at the time. *Rat-nessari Pershad v. Empress*, 2 C. W. N. 498, followed. All bail orders must be issued from the office of the High Court on the same day they are passed, irrespective of the written order on the record. *LAL MOHAN MANDAL v. KALI KISHORE BHUIMALI* (1910) I. L. R. 38 Calc. ... 293

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the carriers under a bill of lading endorsed to the Manufacturing Company, by clause 5 whereof "the carriers were exempt from loss of the goods, unless such loss should have arisen from the negligence or criminal acts of their servants or agents." There was an existing agreement between the Manufacturing Company and the carriers, by clause 10 whereof "the Manufacturing Company undertook and agreed to hold the carriers harmless and indemnified from and against all claims which could be insured against or covered by an ordinary F. P. A. policy." An ordinary F. P. A. policy was issued by the Insurance Company in favour of the Manufacturing Company in respect of the goods, having the clause "warranted no recourse against carriers." The goods were lost by the negligence of the carriers, and the Insurance Company paid the Manufacturing Company the amount of the policy. In an action for the loss of the goods, brought by the Insurance Company and the Manufacturing Company against the Carrying Company, as common carriers:—*Held*, that the action lay. The rights and liabilities of the common carrier in India are outside the Indian Contract Act, and are governed by the principles of the English Common Law as modified by the Carriers Act. A common carrier is subjected to two distinct classes of liability (i) insurable risks from which the element of default is absent, and (ii) carrying risks, in which that element is present. English Courts in dealing with exemption clauses recognise this distinction and construe them as not extending to carrying risks in the absence of clear words to that effect. *Price & Co. v. Union Lighterage Company*, [1904] 1 K. B. 412, *James Nelson & Sons, Limited v. Nelson Line (Liverpool) Limited (No. 2)*, [1907] 1

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K. B. 769, *Wyld v. Pickford*, 8 M. & W. 443, *D'Arc v. London and North-Western Railway Company*, L. R. 9 C. P. 325, *Martin v. The Great Indian Peninsula Railway Company*, L. R. 3 Ex. 9, *Czech v. General Steam Navigation Company*, L. R. 3 C. P. 14, and *Crouch v. The London and North-Western Railway Company*, 23 L. J. C. P. 73, referred to. *Baxter's Leather Company v. Royal Mail Steam Packet Company*, [1908] 2 K. B. 626, distinguished. *A fortiori*, in India, where there is statutory prohibition against exempting a carrier from loss arising from negligence and criminal acts, this canon of construction should be adopted, at any rate within the limits implied in the prohibition. Clause 10 of the Agreement must be construed as an integral part of the contract of carriage; it did not extend to loss arising from negligence or criminal acts. The stipulation in the policy "warranted no recourse against carriers" did not amount to a relinquishment by the Insurance Company in respect of risks not exempted, *i.e.*, where the loss had arisen from the negligence of the carriers. *Thomas & Co. v. Brown*, 4 Com. Cas. 186, distinguished. Inasmuch as the Insurance Company claimed by way of subrogation, and not assignment, the suit should have been brought only in the name of the Manufacturing Company. *Burnand v. Rodocanachi*, L. R. 7 A. C. 333, and *Simpson v. Thomson*, L. R. 3 A. C. 279, referred to. *BRITISH AND FOREIGN MARINE INSURANCE Co., Ltd., v. INDIA GENERAL NAVIGATION AND RAILWAY Co., Ltd.* (1910) 1 L. R. 38 Cal. ... ..

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 —*Waiver of Notice*. Under section 10 of the Carriers Act, before suit, notice of loss must be



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given to the carrier by the plaintiff. Knowledge of the loss, derived <i>aliunde</i> by the carrier is not sufficient. <i>BRITISH AND FOREIGN MARINE INSURANCE CO., LD. v. INDIA GENERAL STEAM NAVIGATION AND RAILWAY CO., LD.</i> , (1910) I. L. R. 38 Calc. ...	50	soner alone—Admissibility of confession of co-accused against prisoner on trial—Evidence Act (I of 1872) s. 30. Where a co-accused pleads guilty, and the Court has accepted the plea and directed his removal from dock, and the trial proceeds against the remaining prisoner alone, a confession by the former is not admissible under s. 30 of the Indian Evidence Act, 1872, against the latter. <i>Queen-Empress v. Pahuji</i> , I. L. R., 19 Bom. 195, approved. <i>EMPEROR v. KERAMAT SIRDAR</i> , (1911) I. L. R. 38 Calc. ...	446
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conspiracy. The evidentiary value of such a confession, under s. 30, is not higher than that of the statement of an accomplice, and it cannot be acted upon unless corroborated by independent testimony implicating the accused in the design with which they are charged. *EMPEROR v. ABANI BHUSAN CHUCKERBUTTY* (1910) I. L. R. 38 Calc. ...

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—*Penal Code*

(Act XLV of 1860), s. 121A—*Whether persons charged with one Conspiracy, can be found guilty of different Conspiracies—Charge of Conspiracy—Acquittal, effect of—Whether persons acquitted can be charged with same offence as part of a conspiracy—Discharge, effect of—Accomplice—Corroboration—Verification—Proceedings, whether corroboration of accomplice or confession—Confession, relevancy of, against co-accused—Evidence Act (I of 1872) s. 30—Retracted Confession, unreliability of.* Where the accused were charged with conspiracy with persons “known and unknown”:—*Held*, that if the persons were “known,” they should be named in the charge. Where a person has been tried for a specific offence and acquitted, and he is subsequently charged with conspiracy of which that offence is alleged to form a part:—*Held*, that an acquittal is conclusive; and it would be a very dangerous principle to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates. *Rez v. Plummer*, [1902] 2 K. B. 339, referred to. The course of not making completed offences the subject of a separate trial, but of throwing them into a case of conspiracy, though lawful, is not to be commended. Before the testimony of an accomplice can be acted on, it must be corroborated in material particulars. There must be corroboration not

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only as to the crime, but also as to the identity of each one of the accused. This is no technical rule, but one founded on long judicial experience. For a conspiracy to wage war, no act or illegal omission is necessary; the agreement of two or more will suffice. While admissions, which include confessions, are by s. 21 of the Evidence Act, 1872, declared *relevant* and may be proved as against the persons making them, all that s. 30 of the Evidence Act provides is that the Court *may* take them into consideration as against other persons. This distinction of language is significant, and shows that the Court can only treat a confession as lending assurance to other evidence against a co-accused, and a conviction on the confession of a co-accused alone would be bad in law. Moreover, under s. 30, that only can be taken into consideration which is a confession in the true sense of the term, so that to place any reliance on a retracted confession against a co-accused would be most unsafe. *Yasin v. Emperor*, I. L. R. 28 Calc. 689, referred to. Verification proceedings do not add any value to an approver's evidence or to confessions, and cannot be regarded as corroboration. A discharge is not binding on the Court, for it is not equivalent to an acquittal. Still a discharge means that the Magistrate, after taking the evidence, found that there were not sufficient grounds for committing the accused for trial. A retracted confession cannot ordinarily take the place of legal proof. Where several persons are charged with the same conspiracy, it is a legal impossibility that some should be found guilty of one conspiracy and some of another, and any accused not shown to be a member of that conspiracy is entitled to demand an acquittal. *Ex-*

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**Contribution—*cont'd.***

able the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. But it is incumbent on final Courts of fact to be guarded and circumspect in their conclusions, and not to countenance acts or payments that are really officious. *Venkata Gopalraju v. Timmayya Pantulu*, I. L. R., 22 Mad. 314, referred to. *Per Doss, J.* Such a case does not come within the purview of s. 70 of the Contract Act, for the plaintiff must in law be held to have deposited the rent in Court in discharge of his own liability, and not in satisfaction of a debt due by another, co-sharer tenants being liable for the rent, not only jointly, but also severally. It was not the intention of the Legislature that section 70 should be invoked where relief might be obtained under any other section of the Act, *e.g.*, ss. 43, 68, 69, 72, 146 or 222. Section 69 is applicable in cases like this. *Smith v. Dinonath Mookerjee*, I. L. R. 12 Calc. 213, discussed. *Damodara Mudaliar v. Secretary of State for India*, I. L. R. 18 Mad. 88, approved of. Though the plaintiff had no right to make the deposits under s. 310A, C. P. C., as his interest in the holding was not affected by the sales, he being no party to the decrees, the deposits being in fact made without protest from any party or Court, and the joint obligation of all tenants discharged thereby, the mere fact that the money was deposited under s. 310A did not place him in a position worse than if he had satisfied the entire decree before sale, nor did it alter the equitable right of the plaintiff to be reimbursed proportionately for the deposit, the benefit of which was enjoyed by others. *Fatima Khatoon Chowdrain v.*

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<i>Mahomed Jan Chowdry</i> , 12 Moo. 1. A. 65; 10 W. R. P. C. 29, <i>Dulichand v. Ramkishan Singh</i> , L. L. R. 7 Cal. 648; L. R. 8 I. A. 93, <i>Johnson v. Royal Mail Packet Co.</i> , L. R. 3 C. P. 38, <i>Edmunds v. Wallingford</i> , L. R. 14 Q. B. D. 811, <i>The Orchis</i> , L. R. 15 P. D. 38, <i>Jugdeo Narain Singh v. Raja Singh</i> , L. L. R. 15 Cal. 656, referred to. In apportioning liability between co-obligees in a suit for contribution, which is eminently an equitable suit, regard must be had more to the real nature of debt than to the decree founded on it. <i>Ram Tuhul Singh v. Bhiswar Lal Sahoo</i> , L. R. 2 I. A. 191; 23 W. R. 305, <i>Ruabon Steamship Co. v. The London Assurance</i> , [1900] A. C. 6, referred to. A decree is not satisfied and the obligation in respect of it is not discharged until the decree-holder receives the money out of Court and satisfaction of the decree is entered; nor does the compulsion of law initiated by the attachment of the property terminate until such satisfaction. <i>SUGRAN GHOSAL v. BALARAM MAIDANA</i> , (1910) I. L. R. 38 Cal. ... 1	
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*pect of the same.* Where after the institution of a civil suit on a promissory note the defendant was called upon to furnish security, and set up, as an answer, to the plaintiffs' claim, a letter which was alleged to bear a forged signature and in respect of which criminal proceedings under ss. 465 and 467 of the Penal Code were taken by one of the plaintiffs:—*Held*, that inasmuch as the letter was a necessary part of the defendant's case and the question of its genuineness a principal issue in the suit, the criminal proceedings ought to be stayed pending the decision in the civil suit. *SHASHI BHUSAN SEAL v. EMPEROR*, (1910) I. L. R. 38 Cal. ... 106

**Criminal Revision—Practice—Jurisdiction of High Court—Rule issued on one or more of several grounds in a petition, and ultimately discharged—Fresh Rule on the grounds of the same petition.** When a rule has been granted on one or more of several grounds contained in a petition and is ultimately discharged, the High Court has no jurisdiction to issue a fresh rule, in the same case, on the other or some of the other grounds of the petition, which were considered on the first occasion, unless permission was given to the party, at the time of the discharge of the first rule, to renew the application on the other grounds or some of them. *Rai Radha Gobind v. Gossain Mohendra Gir*, 6 C. W. N. 340, and *Bibhuty Mohan Roy v. Dasimoni Dassi*, 10 C. L. J. 80, referred to. *JOYMANGAL PERSHAD NARAIN SINGH v. JHAGROO SAHU*, (1911) I. L. R. 38 Cal. 933

**Criminal Trespass—Mischief—Entry by a servant upon land in the possession of the Court of Wards and cutting bamboos thereon under the order of the owner—Penal Code (Act XLV of 1860), ss. 426, 747.** A servant of a

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proprietor who has voluntarily surrendered his estate to the Court of Wards does not commit criminal trespass or mischief by cutting or removing bamboos, etc., growing thereon, for the benefit of his master, under the circumstances of this case. *PARMESWAR SINGH v. EMPEROR*, (1910) I. L. R. 38 Cal. ... 180

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**Decree—Irregularity—Decree, not drawn up—Contents of decree—Costs—Practice.** It is the duty of a Court to draw up a decree after a case has been decided, and the decree should show the costs incurred by the parties. *SAGAR CHANDRA MANDAL v. DIGAMBAR MANDAL*, (1910) I. L. R. 38 Cal. ... 125

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<b>Discharge, effect of: See</b> CONSPIRACY TO WAGE WAR ... ..	559	<i>Failure of witnesses summoned to attend—Duty of Magistrate to summon or compel the attendance of witnesses at the instance of the parties—Denial of justice Interference by High Court—Criminal Procedure (Act V of 1898), s. 145 (4). Section 145 of the Criminal Procedure Code does not render it obligatory on the Magistrate to summon witnesses at the instance of the parties, or to compel their attendance after they have been summoned but failed to appear. Tarapada Biswas v. Nurul Huq, I. L. R. 32 Calc. 1093, followed. Where a Magistrate has acted in accordance with law, it would be necessary to show the High Court very clearly, in order to warrant its interference, that the procedure adopted, though right in law, has in fact amounted to an absolute denial of justice. Where it did not appear what evidence the absent witnesses would be able to give regarding the question of actual possession, and there was nothing to show what efforts the party had made to procure their attendance, the High Court refused to interfere. HARENDRA KUMAR BOSE v. GIRISH CHANDRA MITRA, (1910) I. L. R. 38 Calc. ... ..</i>	24
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<b>Discovery—Inspection—Affidavit of documents—Practice—Civil Procedure Code (Act V of 1908) order XI, rr. 13, 18 (2). The filing of an affidavit of documents under order XI, rule 13 of the Civil Procedure Code by one party, does not preclude the other party from subsequently applying under order XI, rule 18, para. (2), for further discovery and inspection. BASANTA COOMAR GOSWAMI v. KUMUDINI DASEE, (1911) I. L. R. 38 Calc. ... ..</b>	428	<b>—: See</b> JEWISH LAW ... ..	708
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<b>Dispute concerning Land—Joint-owners—Claim of exclusive possession to subject of dispute, by each party—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898) s. 145. A dispute between two sets of joint-owners, each claiming exclusive possession of the land forming part of the joint estate, through their respective tenants, is within the scope of s. 145 of the Criminal Procedure Code. An order declaring the exclusive possession of a tenant of one party is not, therefore, without jurisdiction. Makhan Lal Roy v. Barada Kanta Roy, 11</b>			



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mission of guilt by one of the parties, is cogent evidence which the Court will act on, especially if the admission is corroborated by other evidence. <i>Robinson v. Robinson and Lane</i> , 1 Sw. & Tr. 362, followed. <i>ARNOLD v. ARNOLD</i> , (1911) 1. L. R. 38 Calc.	907
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<b>Drainage—Calcutta Municipal Act (Bengal III of 1899) ss. 299 and 574—Place lawfully set apart for the discharge of drainage—Private common drain belonging to the landlord not subject to right of users as public drain by the Corporation—Liability of tenant.</b> A place lawfully set apart for the discharge, of drainage, by the Corporation within the meaning of s. 299 of Calcutta Municipal Act, must be a place over which the Corporation have acquired by some procedure under the Act, a right to make use of private property as a public drain. A tenant of premises is not bound, under s. 299, to convey the drainage therefrom into a drain belonging to his landlord over which the Corporation have no such right. <i>GOBINDA CHANDRA ADDY v. CORPORATION OF CALCUTTA</i> , (1910) 1. L. R. 38 Calc. ... ..	268
<b>Embankment—Bengal Embankment (Act II of 1882) s. 76, cls. (a), (b)—“Addition to existing embankment,” meaning of—Increasing height of embankment—Essentials of offence under s. 76 (b).</b> The words “existing embankment” in s. 76 (b) of Beng. Act II of 1882 mean an embankment existing at the time the addition is made. <i>Ajodhya Nath Koila v. Raj Krishno Bhar</i> , 1. L. R. 30 Calc. 481, followed. <i>Goverdhan Sinha v. Queen-Em-</i>	

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<b>Embankment—concl'd.</b>	
<i>press</i> , 1. L. R. 11 Calc. 570, explained as overruled. The only offence constituted by cl. (b), as distinguished from cl. (a) of s. 76, is the omission to obtain the sanction of the Collector to the addition to an existing embankment within a prohibited area, irrespective of the question whether such act is likely to interfere with, counteract, or impede any public embankment and public water course. <i>RAMNATH PANDIT v. EMPEROR</i> , (1911) 1. L. R. 38 Calc. ... ..	413
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**Evidence, admissibility of—***Evidence Act (1 of 1872), s. 92—Evidence of acts and conduct of parties to deeds showing that they were treated as being otherwise than they purport to be—Evidence showing actual conveyances to be only mortgages—Fraud with regard to property of third person not party to deed.* Section 92 of the Evidence Act (1 of 1872) is applicable to an instrument “as between the parties to such instrument or their representatives in interest”; but it does not prevent proof of a fraudulent dealing with a third person’s property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. The respondents claimed to recover possession of certain parcels of land under deeds which purport to be absolute conveyances but which the appellants contended were meant to be, and had always in fact been treated by all parties concerned, as mortgages only, and they tendered evidence of the acts and conduct of the parties to that effect. This evidence was excluded by both Courts below under section 92 of the Evidence Act. Their Lordships of the Judicial Committee on appeal were, however, of opinion that on the evidence the

## **Evidence, admissibility of—concl'd.** PAGE.

case for the appellants disclosed a charge of fraud against the respondents antecedent to the deeds, inasmuch as they or the persons under whom they claimed took absolute conveyances of property from the appellants with notice that such property belonged in fact to a third person, the alleged mortgagor, whose evidence would be material and necessary in the matter of the alleged fraudulent dealing. Their Lordships, therefore, without expressing any opinion on the construction or application of section 92 of the Evidence Act in relation to the deeds, came to the conclusion that the rejected evidence should be heard, subject to any objections which the respondents might be advised to take; as the Court would then be in a position to deal hereafter (if necessary) with the admissibility of the evidence in relation not only to the deeds, but also in relation to the questions that might arise in connection with the alleged knowledge or conduct of the parties, antecedent to the execution of those deeds, and upon which their validity might possibly depend. <i>MAUNG KYIN v. MA SHWE LA</i> , (1911) I. L. R. 33 Calc. ...	892
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**Execution of Decree—Attachment—**

*Sale proclamation—Notice—Civil Procedure Code (Act V of 1908) o. XXI, rr. 57, 66—“Default,” meaning of.* On 20th February, 1909, an execution case, which could not proceed owing to the failure of the decree-holder to serve notice on the judgment-debtor as required by o. XXI, r. 66, of the Civil Procedure Code, 1908, was dismissed, the order concluding with these words:—“The execution case is accordingly dismissed, the properties will remain under attachment. Decree-holder will bear his own costs.” On 25th March, 1909, the decree-holder without issuing a fresh attachment again applied for the sale of the property, and duly served the required notice. The judgment-debtor objected on the ground that there was no subsisting attachment. *Held*, that this application must also be dismissed. *Held, per Chitty J.*, that the words of order XXI, rule 57, are imperative and the attachment on the property ceased by operation of law on the 20th February, 1909, and that the word “default” in that rule, cannot be given a restricted meaning so as to confine it to default in appearance, in the payment of process fees, or in production of documents, but must have its ordinary meaning, namely, failure to do what one is legally bound to do. *Held, per Cox J.*, that under the Civil Procedure Code, 1882, the striking off of execution proceedings was capable of different interpretation in different circumstances, but order XXI, rule 57, was enacted to put a stop to the confusion. The application for execution having been dismissed the result specified in order XXI, rule 57, must necessarily follow. *Puddomance Dossee v. Roy Muthooranath Chowdhry*, 20 W. R. 133, *Biswa Sonan Chunder Gosyamy v. Binanda Chunder Dibringar Adhikar Gossyamy*, I. L.

**Execution of Decree—contd.**

R. 10 Calc. 416, *Mohunt Bhagwan Ramanuj Das v. Kheter Moni Dass*, 1 C. W. N. 617, referred to. *NAMUNA BIBI v. RO SHA MIAH*, (1911) I. L. R. 38 Calc. ...

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**—Rent-decree—**

*Limitation—Chota-Nagpur Encumbered Estates Act (Beng. VI of 1876), ss. 3, 12,—Chota-Nagpur Encumbered Estates Amendment Act (Beng. III of 1909), s. 4.* The words “Civil Courts” in section 3 of Act VI of 1876, as amended by section 4 of Act III B. C. of 1909, are comprehensive enough to include the Revenue Courts deciding rent-suits and executing rent-decrees. *Nilmoni Singh Deo v. Taranath Mukerjee*, I. L. R. 9 Calc. 295; *L. R. 9 I. A. 174*, followed. *PRATAP UDAINATH SHAH DEO v. MADAN MOHAN NATH SABI*, (1910) I. L. R. 38 Calc. ...

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**—Sale—Appli-**

*cation to set it aside—Fraud should be definitely established—Irregularity, how far it affects Auction-purchaser—Second application for setting aside sale, if it lies.* The word “fraud” is very loosely used in the class of cases instituted for setting aside sales, any irregularity being taken to be fraud, with all the consequences that such finding involves. A finding of fraud, however, should be reserved for that which is dishonest and morally wrong; and it is not sufficient to come to a vague general finding of fraud; actual fraud must be established. A Court should have much hesitation in visiting an innocent auction-purchaser at one of its sales with the consequences of an irregularity or defect of procedure, which was not discovered by the Court or its officers, at the time of sale, and was not apparent on the face of the record. Where an application to have a sale set aside was dismissed for default and the

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application for restoration was rejected, it is doubtful whether the applicant can successfully prefer a second application for the same purpose. <i>Lalla Bunseedhur v. Koonwur Bindesree Dutt Sing</i> , 10 Moo. I. A. 454, <i>Malkarjun v. Narhari</i> , I. L. R. 25 Bom. 337; L. R. 27 I. A. 216, referred to. <i>Khiarajmal v. Daim</i> , I. L. R. 32 Calc. 296, distinguished. <i>PARESH NATH MALLICK v. HARI CHARAN DEY</i> , (1911) I. L. R. 38 Calc. ...	622	<b>Ex parte Decree:</b> See FRAUD ...	936
<b>—Stay of Execution—Civil Procedure Code (Act V of 1908) s. 145, o. XII, r. 5—Whether a security bond given by the Secretary of State for India in Council, but which was not sanctioned with the concurrence of a majority of votes at a meeting, is sufficient—Government of India Act, 1858, (21 &amp; 22 Vict. c. 106), ss. 39, 40, 41, 42 and 55—Government of India Act, 1859 (22 &amp; 23 Vict. c. 41), s. 1. A decree for recovery of possession of immoveable property having been passed against a minor under the Court of Wards, and the Collector, an appeal was preferred against it to the High Court; subsequently the appellants applied for stay of execution of the decree, and as security they offered a guarantee to be executed by the Government of Bengal on behalf of the Secretary of State for India in Council; but it was not shown that the security had been sanctioned by the Secretary of State for India in Council with the concurrence of a majority of votes at a meeting, as provided by s. 40 of the Government of India Act, 1858:—<i>Held</i>, that the execution of the decree could not be stayed inasmuch as the security offered was not sufficient. <i>SRINIBASH PRASAD SINGH v. KESHO PRASAD SINGH</i> (1911) I. L. R. 38 Calc. ...</b>	754	<b>—: See SUBSTITUTED SERVICE ...</b>	394
		<b>Extradition—Jurisdiction of High Court to revise proceedings of Magistrates under the Extradition Act—High Courts Act, 1861 (24 and 25 Vict. c. 104) s. 15—Extradition Act (XV of 1903) ss. 3 and 4. The High Court has no jurisdiction under s. 15 of the Charter Act, to revise the proceedings of a Magistrate acting under ss. 3 and 4 of the Extradition Act. <i>In re Mohunt Dera Dass</i>, I. L. R. 38 Calc. 550 (note), referred to. <i>RUDOLF STALLMANN v. EMPEROR</i> (1911) I. L. R. 38 Calc. ...</b>	547
		<b>Extradition Act (XV of 1903) ss. 3, 4: See EXTRADITION ...</b>	547
		<b>Fact, question of: See WILL ...</b>	355
		<b>False Document, making of: See FORGERY ...</b>	75
		<b>False Evidence—False statements in an application for mutation proceedings—Obligation to make a true declaration therein—Verification of application—Validity of Rules of the Board of Revenue, Chap V. Rule (5) Penal Code (Act XLV of 1860), ss. 191, 193—Land Registration Act (Beng. Act VII of 1876), ss. 42, 53, 88. An applicant for mutation of names under section 42 of the Bengal Land Registration Act is bound by Rule 5, Chapter V, of the Rules of the Board of Revenue, framed under section 88 of the Act, to make a true declaration on the subject of his application, and is punishable under sections 191 and 193 of the Penal Code for making false statements therein. <i>Debi Saran Misser v. Emperor</i>, 11 C. W. N. 470, referred to. <i>Queen-Empress v. Appayya</i>, I. L. R. 14 Mad. 484, <i>Durga Das Rukhit v. Queen-Empress</i>, I. L. R. 27 Calc. 820, <i>Ezra v. Secretary of State</i>, I. L. R. 30 Calc. 36, and</b>	
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<i>British India Stegm Navigation Co. v. Secretary of State for India</i> , I. L. R. 38 Calc. 230, distinguished. Rules passed by the Board of Revenue under section 88 of the Act, provided they refer to the procedure as to presentation, admission and verification of an application for registration under Part IV of the Act, and as to inquiries under section 52 thereof, have the force of law. <i>NALOO PATRA v. EMPEROR</i> , (1910) I. L. R. 38 Calc.	368
<b>Female Heirs, exclusion of:</b> See HINDU LAW—INHERITANCE	603
<b>Findings of Fact:</b> See SECOND APPEAL	278
<b>Footings—Trespass—Survey Map, evidentiary value of—Mandatory Injunction—Specific Relief Act (I of 1877) Chap X.—Presumption.</b> The existence of footings to a wall, in the circumstances of the case, raised the presumption, that the land covering such footings belonged to the owner of the wall, to which they appertained. Where a wall was constructed by the defendant on the land covering plaintiff's footings, and after its completion a suit was brought by the plaintiff for trespass, the plaintiff not having been guilty of delay or acquiescence:— <i>Held</i> , that the proper remedy was by way of mandatory injunction ordering the demolition of the defendant's wall. <i>ABDUL HOSAIN v. RAM CHARAN LAL</i> (1911) I. L. R. 38 Calc.	687
<b>Forgery:</b> See CRIMINAL PROCEEDINGS, STAY OF	106
— <i>Making a false document</i> —“Dishonestly or fraudulently,” meaning of— <i>Alteration of document in a material part thereof</i> — <i>Affixing one's signature to document not required by law to be attested after execution and registration—Using a forged document—Penal Code (Act XLV of 1860), ss. 24, 25, 463, 464 and 471.</i> Where the accused affixed	

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his signature to a kabuliat, which was not required by law to be attested by witnesses, after its execution and registration, below the names of the attesting witnesses, but without putting a date or alleging actual presence at the time of its execution: *Held*, that such act did not fall within the first clause of s. 464 of the Penal Code, inasmuch as, although it may have increased the apparent evidence of its genuineness, it was not done “dishonestly” or “fraudulently” within ss. 24 and 25; and, further, that it did not justify the inference that he intended it to be believed that the document was made or signed at a time when he knew it was not made or signed, but was consistent with the hypothesis that he intended it to be believed that he would be able, if called as a witness, to prove its genuineness. The expression “*intent to defraud*” implies conduct coupled with an intention to deceive and thereby to injure. The word “*defraud*” involves two conceptions, viz., deceit and injury to the person deceived, that is, an infringement of some legal right possessed by him, but not necessarily deprivation of property. *Queen-Empress v. Muhammad Saeed Khan*, I. L. R. 21 All. 113, *Queen-Empress v. Abbas Ali*, I. L. R. 25 Calc. 512, *Abdul Rajak v. Queen-Empress*, P. R. Cr. 2, and *Reg. v. Toshack*, 4 Cox C. C. 38, referred to: *Held*, further, that the interpolation of the name of a witness as an attester, subsequent to the execution of a document which need not be attested, is not a material alteration thereof within the second clause of s. 464. *Mohesh Chunder Chatterjee v. Kamini Kumari Dabia*, I. L. R. 12 Calc. 313. *Venkatesh Prabhu v. Baba Subraya*, I. L. R. 15 Bom. 44. *Vazeer Ali v. Surya Narain*, 1 Mad. L. J. 388, *State v.*

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<i>Gherkin</i> , 7 Iredell. N. C. 206, <i>Blackwell v. Lane</i> , 4 Dev. & Bat. 113; 32 Am. Dec. 675, approved. <i>Suffel v. Bank of England</i> , 9 Q. B. D. 555, and <i>Reg. v. Asplin</i> , 12 Cox C. C. 391, explained and distinguished. <i>Sitaram Krishna</i> <i>v. Daji Devaji</i> , I. L. R. 7 Bom. 418, dissented from. The test of the materiality of an alteration in a document is not an addition stating a falsehood made ex- pressly or by implication, in order to increase the apparent evidence of its genuineness, but one which alters the legal iden- tity or character of the instru- ment either in its terms or in the relation of the parties to it. <i>SURENDRA NATH GHOSE v. EM-</i> <i>PEROE</i> (1910) I. L. R. 38 Calc. ...	75
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<b>Fraud:</b> See EVIDENCE, ADMISSIBILITY OF ...	892
——: See EXECUTION OF DECREE ...	622
<b>Fraud, absence of:</b> See SPECIFIC PER- FORMANCE ...	805
<b>Fraud—Ex parte decree procured by fraud—Jurisdiction of another Court to set aside the ex parte decree—Investigation how far limited.</b> The defendant obtained an <i>ex parte</i> decree at Akyab upon a promissory note against the plaintiff who subsequently applied under section 108 of the Code of Civil Procedure to set aside the said decree. The <i>ex</i> <i>parte</i> decree was set aside and the suit was revived, but at the hearing the plaintiff could not appear and an <i>ex parte</i> decree was again passed. The plaintiff then brought a suit in the Court to which the <i>ex parte</i> decree was transferred for execution, for a declaration that the said decree was not binding on him, it being based upon no cause of action and being fraudulent, inasmuch as he did not execute any promissory note in favour of the defendant, or receive any money from him. On an objection by the defend-	

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ant that the Court had no juris- diction to enter into the merits of the suit in the Akyab Court, and in any case the only matter that could be investigated was whether the plaintiff had by the action of the defendant been pre- vented from placing his case properly before the said Court: — <i>Held</i> , that the jurisdiction of the Court in trying a suit of this kind was not limited to an in- vestigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the de- fendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree. <i>LAKSEMI CHARAN</i> <i>SAHA v. NUR ALI</i> (1911) I. L. R. 38 Calc. ...	936
<b>Fresh Rule:</b> See CRIMINAL REVISION	933
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<b>Grantor and Grantee:</b> See RENT ...	278
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<b>Guardian—Minor—Guardians and Wards Act (Act VIII of 1890) ss. 8, 13—Applications by mother and grand-mother—Appointment of Nazir as guardian of the pro- perty of the minors, by Court— Purdanashin Lady—Recording of Evidence.</b> Where a mother and grand-mother of two minors se- parately applied to be appointed guardian of the persons and pro- perty of the minors and during the pendency of their applica- tions it was agreed that a cer-	



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tain person should be appointed guardian of the property, but he refused to take up the appointment, the District Judge without holding an inquiry into the respective merits of the applications made an order appointing the Nazir of the Court to be the guardian of the property of the minors:— <i>Held</i> , that the Court had no power to make an order appointing a guardian except on a substantive application under section 8 of the Guardians and Wards Act (VIII of 1890), and that the appointment of the Nazir was <i>ultra vires</i> . Under section 13 of the Guardians and Wards Act (VIII of 1890) the Court is bound to hear such evidence as may be adduced in support of or in opposition to the application before passing an order. The mere fact of the mother being a <i>purdanashin</i> lady was no obstacle to her being appointed guardian of the property; the safe custody of the property and its due administration could be sufficiently guaranteed by security being taken from the proposed guardian by the Court. <i>JAIWANTI KUMRI v. GAJADHAR UPADHYA</i> (1911) I. L. R. 38 Cal. ... 783	783
— <i>Hindu Widow—Re-marriage—Guardians and Wards Act (VIII of 1890), s. 39—Whether a Hindu widow appointed guardian under the Act loses her right of guardianship on re-marriage—Hindu Widows's Re-marriage Act (XV of 1856), s. 3.</i> A Hindu widow who has obtained a certificate of guardianship in respect of the person and property of her infant sons, does not, merely on her re-marriage, lose her right to act as guardian of the minors. <i>GANGA PERSHAD SAHU v. JHALO</i> (1911) I. L. R. 38 Cal. ... 862	862
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<b>Hindu Law—Adoption—Prior right of adoption as between elder and younger widows—Anumatipatra, construction of—Simultaneous or successive Adoption.</b> Where the deceased had executed an <i>anumatipatra</i> in these terms.—“In favour of the first wife, S. B. S. D., and the second wife S. D. . . . giving permission that when I shall be no more, each of my two wives shall be at liberty to act according to their own religious tenets by adopting three sons successively, that is, one after another”:— <i>Held</i> , that the effect of such an instrument was not to sanction a simultaneous adoption, but to give a power of adoption to the two widows successively. That this being so, the elder widow had the prior right to exercise the power of adoption and that the younger widow had no right to adopt before the elder widow had exhausted her right, or refused to use it. <i>Rakhmabai v. Radhabai</i> , 5 Bom. H. C. (App.) 181, followed. <i>Amava v. Mahad-</i>	

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*gauda*, I. L. R. 22 Bom. 416,  
*Mondakini Dasi v. Adinath Dey*,  
 I. L. R. 18 Calc. 69, and *Akhoy*  
*Chunder Bagchi v. Kalapahar*  
*Haji* I. L. R. 12 Calc. 406; L. R.  
 12 I. A. 198, referred to. *BIJOY*  
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*tion of endowed property—Pow-*  
*er of shebait to grant lease in*  
*perpetuity at a fixed rent—Lim-*  
*itation Acts (XV of 1877) Sch.*  
*II, Art. 134 and (IX of 1908),*  
*Sch. I, Art. 134—Bona fide Pur-*  
*chaser—Purchaser of absolute ti-*  
*tle—Privy Council, practice of—*  
*Review of former decision. In a*  
*suit brought by the Raja of Pan-*  
*chakote as the shebait of certain*  
*Hindu deities to recover posses-*  
*sion of debutter property, which*  
*had been alienated, more than 12*  
*years before the institution of the*  
*suit, by the plaintiff's pre-*  
*decessor in title, who had grant-*  
*ed a mokurari lease of the pro-*  
*perty in consideration of a fixed*  
*rent, and payment of a fine equal*  
*to two years' rent: Held (rever-*  
*sing the decision of the High*  
*Court), that the suit was not bar-*  
*red by limitation under article*  
*134 of Schedule II of Act XV of*  
*1877, the lessees (defendants) not*  
*being the purchasers of an abso-*  
*lute title, and therefore not*  
*"purchasers" within the mean-*  
*ing of that article. Abhiram*  
*Goswami v. Shyama Charan Nan-*  
*di*, I. L. R. 36 Calc. 1003; L. R.  
 36 I. A. 148, followed. The Judi-  
 cial Committee of the Privy  
 Council are averse from review-  
 ing on an *ex parte* application,  
 a considered decision in a former  
 case delivered after full argu-  
 ment. *ISHWAR SHYAM CHAND JIU*  
*v. RAM KANAI GHOSE*, (1911) I.  
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—*Inheritance—Docu-*  
*ment attempting to alter the*  
*mode of Succession—Scheme of*  
*Devolution contrary to Hindu*

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*Law—Instrument laying down*  
*rules to secure succession in di-*  
*rect male line for an indefinite*  
*period, and without gift to any*  
*person—Succession on failure of*  
*direct male issue—Exclusion of*  
*female heirs—Dayabhaga Law.*  
 Two brothers *K* and *N*, subject  
 • to the Dayabhaga School of Hin-  
 du Law, executed, on 28th  
 March, 1866, a document where-  
 by after reciting that "whereas  
 body is mortal it is impossible to  
 say what may befall at what  
 time, and as ruin may ensue  
 from disputes relating to the  
 shares arising in future among  
 son, daughter, daughter's son  
 and childless widow unless some  
 rules are regularly framed, and  
 it has accordingly become neces-  
 sary to prescribe a set of rules in  
 that behalf, and hence the rules  
 mentioned below are laid down:  
 these shall become operative and  
 come into force on our death,"  
 they purported to provide for the  
 permanent devolution of their  
 respective properties in the di-  
 rect male line, including adopted  
 sons, with the condition that in  
 case of failure of lineal male  
 heirs in one branch the proper-  
 ties belonging to that branch  
 should go to the other, subject to  
 the same rule, and only in the ab-  
 sence of male descendants in the  
 direct line in either branch were  
 the properties to go to female  
 heirs and their descendants. *K*  
 died in 1868 leaving a son *A*, a  
 daughter *D*, his brother *N* and  
 and their mother *C*. *A* died in  
 1872 without any issue, and *C* in  
 March 1901. The plaintiffs (ap-  
 pellants), who were the sons of  
*D*, instituted this suit on 29th  
 July, 1901, against *N*, claiming,  
 as next reversioners to *A* their  
 maternal uncle, the properties  
 which originally belonged to *K*  
 and which had since come into  
 the possession of *N* the defend-  
 ant. *N* died shortly after the  
 suit was brought, his sons (the  
 respondents) being substituted

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for him on the record. Their contention was that under the instrument of 1866 the properties in dispute passed on the death of A to N and on his death to them. The High Court (reversing the decision of the Subordinate Judge) was of opinion, that in the circumstances that had actually happened, A under the document of 1806 had, in the properties in suit, an absolute estate defeasible in case of death without male issue, and as he died without male issue the heirs of K (the respondents) would succeed. *Held* (reversing that decision), that the clear intention of the instrument of 1866 was to vary the rules of Hindu Law and to control the devolution of the properties until the indefinite failure at some remote period of the male line of K and N; and that such an attempt to alter the mode of succession was, on the principles laid down in the case of *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*, 9 B. L. R. 377; L. R. I. A. sup. vol. 47, illegal and void. Throughout the instrument there was no indication of an intention to make a gift to any person: and there was no warrant for the contention that there was a devise in favour of A with a gift over to N his uncle. The question was not whether the gift over was good in the event which happened, but whether it was good in its creation. *PURNA SHASHI BHATTACHARJI v. KALIDHAN RAI CHOWDURI*, (1911) I L. R. 38 Calc. ... 603

—*Legal Necessity, how to be made out—Onus of proof of legal necessity as affected by lapse of time—Court of Appeal, power of, to make any order to meet justice—Civil Procedure Code (Act V of 1908) o. XLI, r. 33.* A property known as *taluk C* belonged to G, a Hindu. After G's death there was litigation

Hindu Law—*contd.*

regarding the succession. D, the father of the plaintiff, T C, was a party in that litigation. The mother of G was held entitled to succeed. D then brought a suit claiming the estates and sought to set aside an alienation by G's mother of a portion of the estate in favour of M G. The Judicial Committee held finally in that suit that D's suit was barred by *res judicata*, and refused to make any declaration regarding the alienation in the life-time of G's mother. Before her death G's mother sold the entire estate C to M G. After her death, T C, the son of D, and two other persons sued M G for setting aside the alienations on the allegation that T C was the eldest male member in the eldest line, and as such, was entitled to the property by virtue of the rule of lineal primogeniture governing succession in the family. The plaintiffs prayed therein for a decree in favour of T C or, in the alternative, in favour of one or more of the plaintiffs. The first Court decreed the claim of T C. On appeal to the High Court, by the defendant:—*Held*, that, if one or other of the plaintiffs were entitled to succeed, the suit should not be dismissed simply, because the first of the plaintiffs alone had failed to make out a title, particularly when, by so dismissing the suit, the right of the co-plaintiffs (who, if the first plaintiff were not joint with the last male holder would, on failure of the first plaintiff's case, be entitled) would be thereby barred; and that, in such a case, the Appellate Court could exercise the power provided for in the Code of Civil Procedure, o. XLI, r. 33. *Held*, also, that lapse of time did not affect the question of onus of proof regarding legal necessity, except in so far as it might give rise to a presumption of acquiescence or save the alienee from adverse

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inference arising from the scanty proof which might be offered. *Held*, further, that in order to justify legal necessity, it must be shown that the expenses could not have been met from the income of the property in the widow's hands, and that they were reasonable. *Held*, lastly, that payment of full value for the property did not of itself justify a sale by a Hindu widow in the absence of legal necessity. *RAVANESHWAR PRASAD SINGH v. CHANDI PRASAD SINGH*, (1911) I. L. R. 38 Calc. ...

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—*Marriage—Validity of marriage—Evidence and recognition of marriage—Marriage of insane person whether valid—Presumption as to performance of alleged marriage—Degrees of Insanity—Rites and ceremonies of marriage.* The respondents' claim (as opposed to that of the appellants who were distant agnates) to letters of administration depended upon whether the deceased was her father, and whether he was legally married to her mother. The Courts in India had differed: *Held*, (affirming the decision of the High Court) that from the time of the alleged marriage the deceased and the respondent's mother had been recognised by all persons concerned as man and wife, and so described in important documents, and on important occasions. Their daughters were respectably married as would be natural in the case of legitimate children; and that all these facts following upon a ceremony of marriage which undoubtedly took place (though its validity was attacked), afforded an extremely strong presumption in favour of the validity of the marriage, and the legitimacy of its offspring. *Held*, also, that the objection to a marriage on the ground of the mental incapacity of one of the parties

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must depend (as held by the High Court) on a question of degree; and that in this case the evidence of mental infirmity was wholly insufficient to establish such a degree of that defect as to rebut the very strong presumption in favour of the validity of the marriage. The established presumption in favour of the marriage applied to the forms and ceremonies necessary to constitute it a valid marriage; and such forms and ceremonies had been rightly held by the High Court to have been presumably properly performed. *MOUJI LAL v. CHANDRABATI KUMARI*, (1911) I. L. R. 38 Calc. ...

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—*Succession—Prostitute's estate—Stridhan—Severance as effect of degradation—Succession to property of degraded woman.* The absolute property of a Hindu prostitute is to be treated as her *stridhan* for the purposes of succession. So far as succession is concerned, the degradation suffered by prostitution, severs a woman from her natural relations at the moment she becomes degraded, but not from her sons or chaste daughters born after degradation. *In the goods of Kamineymoney Bewah*, I. L. R. 21 Calc. 697, *Surnamoyee Bewa v. Secretary of State for India*, I. L. R. 25 Calc. 254, *Bhutnath Mondal v. Secretary of State for India*, 10 C. W. N. 1085, *Narasanna v. Gangu*, I. L. R. 13 Mad. 133, followed. *Taramunnee Dassie v. Motee Buneecanee*, (1846) S. D. A. 297. *Sivasanku v. Minal*, I. L. R. 12 Mad. 277, approved but distinguished. *Sundari Dassi v. Nemye Charan Daw*, 6 C. L. J. 372. *Subbaraya Pillai v. Ramasami Pillai*, I. L. R. 23 Mr. 171, *Narain Das v. Tirlok Tiwari*, I. L. R. 29 All. 4, not followed. *TRIPURA CHARAN BANERJEE v. HARIMATI DASSTI*, (1911) I. L. R. 38 Calc. ...

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—Will—Construction of will—Judgment of Privy Council—"In equal shares for life and benefit of survivorship between themselves"—Judgment to be limited to the events then happened—Gift to a class valid, although some of class born after testator's death, and hence incapable of taking—Hindu Wills Act (XXI of 1870) ss. 2, 3—Indian Succession Act (X of 1865) ss. 85, 98, 100, 101, 102—Incorporation of statutes—Liberty to apply—Practice. The will of a Hindu directed his executors in certain events (which happened) "to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give devise and bequeath the same but should either of my said daughters die without leaving any male issue surviving but leaving my other daughter her surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in the case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike." The testator died leaving him surviving his widow, two daughters R. and P. and three sons of P. viz., R. P., K. P. and J. P. At the time of the happening of the events on which the gift in favour of the daughters and their sons came into operation, there were living R. and P. and four sons of P. viz., R. P., K. P., P. L. and B. L., the latter two of whom were born subsequent to the testator's death. In a suit brought by R. for the construction of the will and a declaration of the rights of the parties, the Privy Council held that "in the events that had happened, the daughters R. and P. were entitled to

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the testator's estate in equal shares for life and with benefit of survivorship between themselves." The liberty to apply reserved by the High Court to the parties, amongst whom were the sons of P., was affirmed. Subsequent to the order in Council, P. died leaving her sons R. P., K. P., P. L. and B. L. her surviving. R. P. and K. P. thereupon claimed to be entitled to their mother's share. An application, in this behalf, was made by R. P. to the High Court:—*Held*, that the application was properly made, under the liberty reserved. The Privy Council in making their order intended only to describe the utmost interest that the daughters could take as between themselves in the events which up to that time had happened, and had no intention to decide the rights of sons in reference to a subsequent contingent event, which had now happened in the death of P. leaving sons. The canon of construction to be applied to a statute incorporating the provisions of another statute, as defined in *In re Wood's Estate*, 31 Ch. D. 607, approved of. Section 3 of the Hindu Wills Act, which controls both the quantity and quality of the interest created, including the capacity of the donee to take, modifies the operation of the incorporated section 98 of the Succession Act, by the introduction of the rule of Hindu Law, that a bequest to a person not in existence at the time of the testator's death, is void. *Alangamonjori Dabee v. Sonamoni Dabee*, I. L. R., 8 Calc. 637, and *Cally Nath Naugh Chowdhry v. Chunder Nath Naugh Chowdhry*, I. L. R. 8 Calc. 378, followed. Hence P. L. and B. L. took no share and P.'s share devolved on R. P., K. P. and the representatives of J. P. The



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gift to P.'s sons as a class did not become void by reason of the incapacity of some of them, viz., the after-born sons, from taking under the will, as the class intended to be benefited could be ascertained within the period permitted by law. *Leake v. Robinson*, 2 Meri. 363, distinguished. *Kingsbury v. Walter*, [1901] A. C. 187, *Dowset v. Sweet*, 1 Amb. 175, *Young v. Davies*, 2 Drew. and Sm. 167, *Shaw v. M'Mahon*, 4 Dr. and War. 431, *Fell v. Biddulph*, L. R. 10 C. P. 701, referred to. RADHA PRASAD MALLICK v. RANIMONI DASI, (1910) I. L. R. 38 Calc. ... .. 188

*Will—Construction of Will—Bequest to a Class—Persons not born at death of testator—Intention of testator.* The will of a Hindu testator without issue, after giving his wife and his mother possession of his property moveable and immovable for their lives, contained the following clause. "On the death of my mother and my wife the sons of my sisters, that is to say, their sons who are now in existence as also those who may be born hereafter shall in equal shares hold the said properties in possession and enjoyment by right of inheritance, and shall maintain intact and continue the service of the established deities and ancestral rites according to the practice heretofore obtaining." The testator died the day following the execution of the will. *Held* (affirming the decision of the High Court), that the intention was not to declare that the sisters' sons had a "right of inheritance," but to give them under the will a vested interest in their respective shares at the testator's death, though postponing their possession and enjoyment until the deaths of the mother and widow. Assuming that the

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testator's intention was that all his nephews, whether then in existence or after born should take, there was a valid bequest to such of them as were capable of taking at his death, notwithstanding that others of the class were incapacitated from taking because not then born. *Ram Lal Sett v. Kanai Lal Sett*, 1. L. R. 12 Calc. 663, upheld and approved, as laying down the general rule of construction applicable to Hindu wills in the case of such a bequest where there is no other objection to it. *Dias v. De Livera*, L. R. 5 A. C. 123, referred to, as stating a convenient rule to apply to wills of Hindus, that a gift to children not in existence at the date of the gift should be limited to those born between the date of the will and the death of the testator. BHAGABATI BARMANYA v. KALICHARAN SINGH, (1911) I. L. R. 38 Calc. ... .. 463

**Hindu Widow:** See GUARDIAN ... 862

**Hindu Widows's Remarriage Act (XV of 1856) s. 3:** See GUARDIAN 862

**Hindu Wills Act (XXI of 1870) ss. 2, 3:** See HINDU LAW ... 188

**Husband and Wife—Suit by husband for divorce on the ground of wife's fault—Allegation of her theft of jewellery belonging to husband—Wife's abandonment of defence and submission to decree for divorce—Decree not by mutual consent—Subsequent suit for partition of property—Civil Procedure Code (Act XIV of 1882), ss. 42, 43—Objection taken for first time on appeal.** For the purpose of dealing with and distributing, in accordance with the Burmese Buddhist law, property belonging to a husband and wife, who have been divorced, it was necessary, in a suit brought by the husband for partition, to determine whether the divorce was by mutual con-



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sent or was granted on the fault of the wife. It appeared from the husband's claim to a divorce that he set forth the wife's offence that she had by sundry fraudulent devices stolen certain jewels which were his property, and he asked for a decree on that ground alone. The wife in her defence denied the allegations as to her misconduct, and asked for the dismissal of the suit with costs. Witnesses were summoned, but on the day fixed for hearing she abandoned her defence, and, although continuing to deny her guilt, consented to a divorce, and judgment was therefore given for a "decree as prayed." <i>Held</i> , (upholding the decision of the District Judge), that the divorce was not made by mutual consent. The proceedings disclosed not an agreement between husband and wife, but a claim by the husband to which the wife submitted. It was objected for the first time on appeal to the Chief Court that the husband had no right to partition of the property unless he asked for it in the suit for divorce. The Chief Court held that the matter being one of procedure must be determined by sections 42 and 43 of the Civil Procedure Code of 1882, and decided that having failed to include in his suit for divorce a claim for partition he must be taken to have relinquished it, and his subsequent suit for that relief was barred. <i>Held</i> , that it was too late to raise the point for the first time in the Court of appeal. <i>Held</i> , also, (reversing the decision of the Chief Court), that sections 42 and 43 were not applicable to a case like the present. The cause of action for divorce was the misconduct of the wife, and the cause of action for the partition was the divorce of the wife founded on that misconduct. The evidence		needed in each case was also different, and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition could properly arise. If the Court found that the plaintiff had unnecessarily severed his claim for a partition from that for a divorce, it could punish him by the exercise of its discretion as to costs; but such a severance did not come within the mischief aimed at by sections 42 and 43 of the Code so as to bar the claim to a partition which may be founded on the decree for divorce itself. <i>MAUNG PE v. MA LON MA GALE</i> , (1911) I. L. R. 38 Cal. ... 629	
		<b>Impartible Estate: See SUCCESSION CERTIFICATE</b> ... 182	
		<b>Incitement to Murder and Acts of Violence: See PRINTING PRESS, FORFEITURE OF</b> ... 202	
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		<b>Income Tax, illegal levy of: See MUNICIPAL ELECTION</b> ... 501	
		<b>Incorporation of Statutes: See HINDU LAW</b> ... 188	
		<b>Incumbrance: See MORTGAGE</b> ... 923	
		<b>Indigo, cultivation of: See LANDLORD AND TENANT</b> ... 432	
		<b>Inference of Law: See SECOND APPEAL</b> ... 278	
		<b>Infringement: See TRADE-MARK</b> ... 110	
		<b>Inheritance: See HINDU LAW</b> ... 603	
		<b>Injunction:—Cases where injunction might be granted—Plaintiff out of possession—Prima facie claim to the disputed property—Irreparable injury.</b> Where the plaintiff is out of possession, and claims possession, the Court will refuse to interfere by grant of injunction against the defendant in possession under a claim of right; but where the threatened injury, will be irreparable, an injunction will lie at the instance of a complainant out of possession. No injunction should be granted in a case where there	

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<b>Injunction—concl'd.</b>		<b>Insolvency—concl'd.</b>	
is no foundation for any suggestion that the defendants are about to commit an act in the nature of waste. Where the plaintiff has another adequate remedy, and where if an injunction were granted it would be of the vaguest description, no injunction ought to be granted in such cases. <i>KESHO PRASAD SINGH v. SRINIBASH PRASAD SINGH</i> , (1911) I. L. R. 38 Calc. 791	791	in Bankruptcy of the property of the firm was appointed by the English Court. On an application of the Trustee in Bankruptcy to that Court, it was ordered that the High Court of Judicature in Bengal be requested to act in aid of and be auxiliary to it. The Trustee in Bankruptcy, thereupon, petitioned the High Court in Bengal presenting the order of the English Court and seeking the assistance of the High Court in and about the said insolvency. He obtained an order that the High Court of Judicature in Bengal and its officers do act in aid and be auxiliary to the High Court of Justice in England and, further, that James, the manager in Calcutta of the firm of L. King & Co., do personally attend before this Court to be examined before it. Upon James appearing on the date fixed for his examination and objecting that he ought not to be examined, because the order ought not to have been made:— <i>Held</i> , that to get the jurisdiction to examine James as a witness, there must be a request from the English Court asking this Court to act in aid, and a letter of request from the one Court to the other ought to have been sent, and that the order of the English Court presented by the Trustee in Bankruptcy was not sufficient to give this Court jurisdiction. <i>In re L. KING &amp; Co., BANKRUPTS</i> , (1911) I. L. R. 38 Calc. 542	542
<b>Jurisdiction—Restraint of proceedings in Subordinate Court, outside the jurisdiction of High Court—Injunction in personam.</b> The High Court can restrain proceedings in a Court outside its jurisdiction only if the party sought to be restrained is within its jurisdiction, and it is not sufficient that the party should have property within the jurisdiction. <i>Vulcan Iron Works v. Bishumbhar Prosad</i> , I. L. R. 36 Calc. 233, followed. <i>The Carron Iron Co. v. Maclaren</i> , 5 H. L. C. 416, referred to. <i>Mungle Chand v. Gopal Ram</i> , I. L. R. 34 Calc. 101, not followed. <i>JUMNA DASS v. HARCHARAN DASS</i> , (1910) I. L. R. 38 Calc. 405	405	<b>Inspection:</b> See DISCOVERY 428	428
<b>Injunction in personam:</b> See INJUNCTION 405	405	<b>Insurance Policy:</b> See COMMON CARRIER, LIABILITIES OF 28	28
<b>Injury (Irreparable):</b> See INJUNCTION 791	791	<b>Intention of Parties:</b> See MINERAL RIGHTS 845	845
<b>Injury to Health:</b> See NUISANCE 296	296	<b>Interest, right to:</b> See MORTGAGE 342	342
<b>Injury to House:</b> See PROHIBITORY ORDER 876	876	<b>Interlocutory Order:</b> See LAND ACQUISITION 230	230
<b>Insanity:</b> See HINDU LAW—MARRIAGE 700	700	<b>Intestacy:</b> See JEWISH LAW 708	708
<b>Insolvency—Adjudication in England—Trustee in Bankruptcy—Petition to the Indian Court to act in aid of, and to be auxiliary to, the English Court—Examination of Witness—Jurisdiction—Bankruptcy Act, 1883 (46 and 47 Vict. c. 52) ss. 27, 118—Presidency-Towns Insolvency Act (III of 1909) s. 126.</b> The firm of L. King & Co. carrying on business in London as well as in Calcutta was adjudicated bankrupt in England, and a Trustee		<b>Inveighing against Hindus and Mahomedans alike:</b> See SEDITION 214	214
		<b>Investigation:</b> See FRAUD 936	936

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<b>Irregularity:</b> See AUCTION-PURCHASER	622
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<b>Jewish Law—Custom—“Ketubah”</b> — Marriage settlement—Charge on husband's property—Priority— Intestacy—Rights of Wife in event of a Divorce. A ketubah does not create any charge in favour of a widow against her deceased husband's estate. It gives a right enforceable by an innocent wife when she is di- vorced by her husband. MOZEL- LE JOSHUA v. SOPHIE ARAKIE, (1911) I. L. R. 38 Calc.	708
<b>Joint Trial:</b> See CONFESSION	446
<b>Joint Owners:</b> See DISPUTE CONCERN- ING LAND	889
<b>Judge, personal knowledge of:</b> See JUDGEMENT	153
<b>Judgment—a nullity:</b> See JURISDIC- TION	639
<b>Judgment—Personal knowledge of Judge—Materials not in evi- dence or improperly admitted as basis of judgment—Validity of such judgment.</b> A judgment which is based on materials which were not in evidence and which have been improperly ad- mitted or on the personal know- ledge of the Judge, is not in accordance with law. Vallabha v. Madusudanan, I. L. R. 12 Mad. 495, referred to. DURGA PRASAD SINGH v. RAM DOYAL CHAUDHURI, (1910) I. L. R. 38 Calc.	153
<b>Jurisdiction:</b> See APPEAL	391
—: See ARBITRATION BY COURT	421
—: See FRAUD	936
—: See INSOLVENCY	542
—: See PRESIDENCY SMALL CAUSE COURT	425
—Undervaluation of suit —Change of Court of Appeal owing to undervaluation—Juris- diction of Appellate Court— —Judgment of Court having no jurisdiction, a nullity—Effect of such judgment—Consent-decree	

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to the prejudice of minor or any  
reversionary heir, not binding  
on heir—Stranger, introduction  
of, into appeal, without leave of  
Court. A suit was intentionally  
undervalued. The defendants  
raised no objection as regards  
valuation, and the suit was  
tried. The appeal was filed be-  
fore the District Judge instead  
of before the High Court, in  
consequence of the undervalua-  
tion, and the District Judge de-  
cided the appeal, by a consent-  
decree. Held, that if a Court  
has no jurisdiction over the sub-  
ject-matter of the litigation, its  
judgments and orders, however  
precisely certain and technically  
correct, are mere nullities, and  
not only voidable; they are void  
and have no effect either as  
estoppel or otherwise, and may  
not only be set aside at any  
time by the Court in which they  
are rendered, but be declared  
void by every Court in which  
they may be presented. These  
principles apply not only to Ori-  
ginal Courts, but also to Courts  
of Appeal. Jurisdiction cannot  
be conferred upon a Court of  
Appeal by consent of parties,  
and any waiver on their part  
cannot make up for the lack or  
defect of jurisdiction. Gurdeo  
Singh v. Chandrikah Singh,  
I. L. R. 36 Calc. 193, Baij Nath  
Singh v. Gajraj Singh, 7 All. L.  
J. R. 675, Gooroo Persad Roy v.  
Juggobundoo Mozoomdar, (1862)  
W. R. F. B. 15, Golab Sao v.  
Chowdhury Madho Lal, 9 C. W.  
N. 956, Ledgard v. Bull, I. L.  
R. 9 All. 191; L. R. 13 I. A. 134,  
Minakshi Naidu v. Subramanya  
Sastri, I. L. R. 11 Mad. 26; L.  
R. 14 I. A. 160, Lawrence v.  
Wilcock, 11 A. & E. 941, The  
Queen v. The Judge of the Coun-  
ty Court of Shropshire, 20 Q. B.  
D. 242, and In re Aylmer, 20  
Q. B. D. 258, referred to. When  
in a suit between a Hindu wi-  
dow, and a claimant to the  
estate of her husband, a stran-

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ger who was not a party to the suit in the Original Court was made a party to the appeal without leave of the Court and a consent-decree made, the decree was not binding upon the reversionary heirs. A Hindu widow, who is a limited or qualified owner, cannot confess judgment and be party to a consent-decree so as to bind the inheritance in the hands of the reversionary heirs. *Katama Natchier v. The Rajah of Shivagunga*, 9 Moo. I. A. 539, *Stapilton v. Stapilton*, 1 White & Tud., 8th Ed., 234; 1 Atk. 2, distinguished. *Imrit Konwar v. Roop Narain Singh*, 6 C. L. R. 76, explained. *Sheo Narain Singh v. Khurgo Kocerry*, 10 C. L. R. 377, *Sant Kumar v. Deo Saran*, I. L. R. 8 All. 365, *Jeram Laljee v. Veerbat*, 5 Bom. L. R. 885, *Gobind Krishna Narain v. Khunni Lal*, I. L. R. 29 All. 487, *Mahadei v. Baldeo*, I. L. R. 30 All. 75, *Roy Radha Kissen v. Nauratan Lall*, 6 C. L. J. 490, *Asharam Sadhani v. Chandi Churn Mukerjee*, 13 C. W. N. 147, referred to. A consent-decree does not operate to the prejudice of persons not parties thereto. *Nicholas v. Asphar*, I. L. R. 24 Calc. 218, *In re South American and Mexican Company*, [1895] 1 Ch. 37, and *The Bellcairn*, 10 P. D. 161, distinguished. *Huddersfield Banking Company, Limited v. Lister*, [1895] 2 Ch. 273, followed. *RAJLAKSHMI DASEE v. KATYAYANI DASEE*, (1910) I. L. R. 38 Calc. ... 639

<b>Jurisdiction of High Court:</b>	<i>See</i>	
EQUITABLE MORTGAGE	...	824
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—*Power to revise an order of acquittal at the instance of a private party*  
—*Decision on a point of local*

**Jurisdiction of High Court—*contd.***

*jurisdiction and not on the merits—Criminal Procedure Code (Act V of 1898) ss. 432, 439 (5) —Practice. Section 439 (5) of the Criminal Procedure Code does not bar the jurisdiction of the High Court to interfere with an order of acquittal on an application made at the instance of a private party. Where the Appellate Court set aside a conviction and sentence on the ground that the place of occurrence was outside the local limits of the trying Magistrate's jurisdiction, overlooking the provisions of s. 531 of the Code, the High Court set aside the order of acquittal and directed a rehearing of the appeal. What the Appellate Court has to find is whether the offence, of which an accused is convicted, has been made out not with reference to any dispute as to jurisdiction, but on the merits and in accordance with the evidence. KANGALI SARDAR v. BAMA CHARAN BHATTACHARJEE, (1911) I. L. R. 38 Calc. ... 786*

—*Revision*  
—*Appeal wrongly laid before Collector instead of District Judge*  
—*Procedure by Deputy Collector under s. 109 of the Rent Recovery Act—Civil Procedure Code, how far governs Act X of 1859*  
—*Act X of 1859, s. 109—Civil Procedure Code (XIV of 1882), s. 310A. The High Court has jurisdiction to interfere with the orders of the Collectors and Deputy Collectors, passed under Act X of 1859. Huro Mohun Mookerjee v. Kedarnath Doss, 5 W. R. (Act X) 25, commented on. Bhyrub Chunder Chunder v. Shama Soonderee Deba, 6 W. R. (Act X) 68, Gobind Coomar Chowdhry v. Kisto Coomar Chowdhry, 7 W. R. 520, Deanutollah v. Nowab Nazim Sidhee Nuzzer Ali Khan Bahadoor, 10 W. R. 341, Gudadhur Chatterjee v. Nund Lall Mookerjee, 12 W.*

**Jurisdiction of High Court—contd.**

R. 406, *Sreemutty Nassir Jan v. Akbar Mozoomdar*, 15 W. R. 418, *Nilmoni Singh Deo v. Taranath Mukerjee*, I. L. R. 9 Calc. 295, referred to. *Mohant Gobind Ramanuja Das v. Lakkan Parida*, 11 C. W. N. 112, explained. The jurisdiction of the Deputy Collector under Act X of 1859 being a limited one, and the procedure under s. 109 of the said Act not being strictly followed, a sale under s. 109 must be held to be *ultra vires*. *Deanutoollah v. Nowab Nazim*, 10 W. R. 341, referred to. Except upon points expressly provided for by Act X of 1859, the procedure of the Revenue Courts must be governed by the Civil Procedure Code. The *ratio decidendi* of *Nilmoni Singh Deo v. Taranath Mukerjee*, I. L. R. 9 Calc. 295, followed. *Harish Chandra Ghose v. Ananta Charan Patra*, 2 C. W. N. 127, doubted. *Adhirani Narain Kumari v. Raghu Mohapatra*, I. L. R. 12 Calc. 50, approved. *Radha Madhub Santra v. Lukhi Narain Roy Chowdhry*, I. L. R. 21 Calc. 428, and *Mokunda Bullav Kar v. Bhogaban Chunder Das*, I. L. R. 21 Calc. 514, discussed. *Nagendro Nath Mullick v. Mathura Mohun Parki*, I. L. R. 18 Calc. 368, explained. *Harc Krishna Mahanti v. Bishnu Chandra Mahanti*, I. L. R. 35 Calc. 799, *Ram Lochan Singh v. Beni Prasad Kumri*, I. L. R. 36 Calc. 252, and *Madho Prakash Singh v. Murli Manohar*, I. L. R. 5 All. 406, referred to. Where a sale under Act X of 1859 is impeached as *ultra vires* and illegal or the sale is rightly sought to be set aside under s. 310A of the Code of Civil Procedure (XIV of 1882), the proceedings of the Deputy Collector are amenable to the revisional jurisdiction of the High Court in either case. The fact that the original suit was valued at above Rs. 100 and an appeal lay to the

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District Judge and not to the Collector, before whom the appeal was, in reality, heard, does not take away the right of the High Court to interfere in revision. CHAITAN PATGOSI MAHAPATRA v. KUNJA BEHARI PATNAIK, (1911) I. L. R. 38 Calc. ... 832

**Jurisdiction of Magistrates:—See OFFERINGS TO DEITY** ... 387

**Jute trade, usage of: See VENDOR AND SUB-VENDEE** ... 127

**"Ketubah": See JEWISH LAW** ... 708

**Khud-kash: See LANDLORD AND TENANT** ... 432

**Killajat Estates, Orissa: See RENT** 278

**Land Acquisition—Jurisdiction of High Court to review award of Land Acquisition Collector—Collector acting under s. 11, if a "Court" and subordinate to the High Court—Land Acquisition Judge, powers of—Discovery—Interlocutory orders—High Court's powers to interfere with interlocutory orders—Land Acquisition Act (I of 1894), ss. 9, 10, 11, 18, 20, 21, 50, 53—High Courts Act of 1861, s. 15—Civil Procedure Code (Act V of 1908), s. 115, o. xi, r. 12.** The High Court has no jurisdiction to review an order made by the Collector under s. 11 of the Land Acquisition Act as the Collector acting under that section is not a Court, but only an agent of the Government. *Durga Das Rukhit v. Queen Empress*, I. L. R. 27 Calc. 820, *Ezra v. Secretary of State*, I. L. R. 30 Calc. 36; I. L. R. 32 Calc. 605, referred to. *Administrator-General of Bengal v. The Land Acquisition Collector*, 12 C. W. N. 241, *Lekhray Ram v. Debi Pershad*, 12 C. W. N. 678, *Abdool Ali v. Verner*, 23 W. R. 73, *Luchmeswar Singh v. The Chairman of the Darbhanga Municipality*, I. L. R. 18 Calc. 99; I. L. R. 17 I. A. 90, distinguished. Civil courts are not powerless to afford relief to a



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person aggrieved by proceedings taken in nominal compliance with statutory provisions. *Rameswar Singh v. Secretary of State for India*, I. L. R. 34 Calc. 470, referred to. It is, however, doubtful how far and in what precise mode such relief can be claimed by the Secretary of State or a Corporation for whose benefit proceedings have been taken by the Government under the Land Acquisition Act. The expression "any person interested" in s. 18 does not include the Secretary of State. *Attorney-General v. Great Western Railway Company*, 4 Ch. D. 735, referred to. The Court of the Land Acquisition Judge is a court of special jurisdiction; the powers and duties of which are defined by statute, and it cannot be legitimately invited to exercise inherent powers and assume jurisdiction over matters not intended by the Legislature to be comprehended within the scope of the enquiry before it. *Shyam Chunder Mardraj v. Secretary of State for India*, I. L. R. 35 Calc. 525. *Gajendra Sahu v. Secretary of State for India* 8 C. L. J. 39, distinguished. It was never contemplated by the statute to authorise the Land Acquisition Judge to review the award of the Collector, to cancel it or to remit it to him to be recast, modified or reduced. The Court of the Land Acquisition Judge is restricted to an examination of the question which has been referred by the Collector for decision under s. 18, and the scope of the enquiry cannot be enlarged at the instance of parties who have not obtained or cannot obtain any order of reference. *Promotha Nath Mitra v. Rakhal Das Addy*, 11 C. L. J. 420, followed. An order for discovery can be made in a case under the Land Acquisition Act, under o. xi, r. 12, Civil Procedure Code. *Kishan Chand v.*

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*Jagannath Prasad*, I. L. R. 25 All. 133, referred to. When, however, the right to discovery in any form depends upon the determination of any issue or question in dispute is a matter, or it is desirable that some issue or question of law or fact or mixed question of law and fact in dispute should be determined first, the question of discovery may be reserved till after the issue or question has been determined. *Whyte v. Ahrens*, 26 Ch. D. 717, referred to. The High Court is not powerless to set matters right when an interlocutory order has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants. *Gobind Mohun Doss v. Kunja Behary Doss*, 10 C. L. J. 407, referred to. **BRITISH INDIA STEAM NAVIGATION CO. v. SECRETARY OF STATE FOR INDIA**, (1910) I. L. R. 38 Calc. ... 230

**Land Acquisition Act (I of 1894), ss. 9 to 21, 50, 53:** See LAND ACQUISITION ... 230

**Land Acquisition Judge:** See ACQUISITION ... 230

**Landlord, purchase by:** See MORTGAGE ... 923

**Landlord and Tenant:** See MINERAL RIGHTS ... 845

—*Leases, raiyati, zurpeshgi and others—Cultivation of Indigo—Acquisition of right of occupancy—Nature of holding—Zeraat, khudkasht and private land of landlord—Notice to quit on expiry of lease—Suit to recover land leased—Bengal Tenancy Act (VIII of 1885) s. 5, clause (5) and section 116—Raiyat—Tenure-holder.* The appellants (plaintiffs) were the proprietors of the village of Ballipura Parsram; and the owners of the Hathowri Indigo Concern (the predecessors in title of the respondent, defendant) and the res-



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	pondent himself, had been their tenants under various leases (raiyyat, zurpeshgi and others) since 1837 for the cultivation of indigo. To a suit brought to recover two areas of land of 156 bighas and 25 bighas respectively, on the ground that the latest leases (of 21st October 1891) and 10th February 1892) under which they were respectively held, had expired, the respondent pleaded as to the larger area that he had acquired occupancy rights, and that even assuming he had not acquired such rights a notice to quit was necessary under section 45 of the Bengal Tenancy Act (VIII of 1885) before he could be ejected. The latter defence alone was set up as to the smaller area. The Subordinate Judge held, on the construction of the various leases, that the larger area was the appellants' private land in respect of which, therefore (within the meaning of section 116 of the Bengal Tenancy Act) the respondent could not acquire a right of occupancy and (acting on the presumption under section 5, clause (5) of the Act, and on an admission that the smaller area was the private land of the appellants) he decided that the respondent was a tenure-holder and not a raiyat in respect of all the land in suit, and that he could be ejected without notice to quit. The High Court on appeal reversed that decision, holding as to the larger area that the presumption under section 5, clause (5) of the Act had been rebutted, and that respondent was a raiyat and not a tenure-holder, and (notwithstanding the admission) came to a similar conclusion as to the smaller area; and decided that the respondent had acquired rights of occupancy in both areas of land, and a notice to quit was necessary before ejectment. <i>Held</i> (by the Judicial Committee),	
	<b>Landlord and Tenant—<i>concl.</i></b>	
	that on the construction of the leases and under the circumstances of the case the High Court had rightly decided as to the larger area, but were wrong in going behind the admission made as to the smaller area. <i>Bengal Indigo Company v. Roghobur Das</i> , I. L. R. 24 Calc. 272; L. R. 23 I. A. 158, distinguished, on the ground that in that case there was no finding of fact to rebut the presumption under section 5 clause (5) of the Bengal Tenancy Act. <i>DAMODAR NARAYAN CHOWDHURI v. DALGLIESH</i> , (1911) I. L. R. 38 Calc. 432	
	<b>Land Registration—How far ss. 78 and 81 of the Land Registration Act (Beng. VII of 1876) affect s. 60 of the Bengal Tenancy Act—<i>Estoppel—Estoppel against Act of Legislature—Land Registration Act (Beng. VII of 1876)</i>, ss. 78, 81—<i>Bengal Tenancy Act (VIII of 1885)</i>, s. 60. There can be no estoppel against an Act of the Legislature. <i>Jagabandhu Saha v. Radha Krishna Pal</i>, I. L. R. 36 Calc. 920, followed. Section 60 of the Bengal Tenancy Act governs a suit for rent where the plaintiff claims rent as proprietor of an estate, though rent is sought to be realised on the basis of a contractual obligation. The restrictions imposed by section 81 upon section 78 of the Land Registration Act cannot be incorporated by implication into section 60 of the Bengal Tenancy Act. The plaintiff, an unregistered part-proprietor of an estate, is not entitled to succeed as against the defendant who, relying upon section 60 of the Bengal Tenancy Act, has established that his debt has been discharged by payment of rent to the registered proprietor. <i>ABDUL AZIZ v. KANTHU MALLIK</i>, (1910) I. L. R. 38 Calc. 512</b>	
	<b>Land Registration Act (Beng. VII of 1876) ss. 42, 53, 88: See FALSE EVIDENCE</b> ... 368	

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— <i>Hindu Deities—Suit for removal of Hindu Deities from one's custody to another's—Limitation Act (XV of 1877), Sch. II, Arts. 49, 120, 145. A suit by Thakurs (deities) themselves for removing themselves from the custody of the defendants to the custody of the plaintiffs other than themselves is not a suit for a moveable property. It would be a suit for which no provision is made in the Limitation Act, and would therefore naturally come under Art. 120 of Schedule II of the Act unless any other Article also applied. Article 49 has no application to such cases. BALI PANDA v. JADUMANI SANTRA, (1910) I. L. R. 38 Cal.</i>	284
<b>Limitation Act (XV of 1877) s. 22: See MORTGAGE</b>	342
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<b>Magistrate, power of—Order to Police to take possession of account books the subject of an offence, without summons to produce or search warrant issued—Legality of order—Reference of case after local investigation to a Magistrate for inquiry and Report—Irregularity—Quashing pending proceedings—Criminal Procedure Code (Act V of 1898) ss. 94, 96, 192, 202—Valuable security—Title page of account book containing names and shares of the partners signed by them—Penal Code (Act XLV of 1860) s. 30. A Magistrate may, on taking cognizance of a complaint, issue either a summons under s. 94 or a search warrant under s. 96 of the Criminal Procedure Code, but is not competent to pass an order directing the police to take possession of account books forming the subject of the charge. If the Magistrate, after first having examined the complainant under s. 200, is not satisfied that process should issue, he can, under s. 202, either hold an inquiry and take evidence himself, or direct a "local investigation" by a subordinate officer. After ordering a police investigation, he may, if dissatisfied with the materials, personally make a further inquiry and take evidence, or direct a further "local investigation,"</b>	

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**Magistrate, power of—concl'd.**

but not an inquiry and report by another Magistrate. If he thinks it proper to send the case to a Magistrate for inquiry, other than a "local investigation," he should transfer it under s. 192 to the latter for disposal, and not for a report. Where the complainant made no specific allegations of facts in the complaint, but stated in his examination on investigation under s. 202 that when the *judha* books were first opened, the title pages contained the name of his son as a partner, and that he later discovered that a substitution of pages had been made showing the name of his father-in-law as a partner, and the statements in the complaint and such examination were not consistent as to the names originally entered, and he was contradicted by his only witness in several particulars, and his story was not supported by the original deed of partnership of the payment of the contributions, it was held that the proceedings must be quashed as the materials before the Magistrate disclosed no offence. *Jagat Chandra Mazumdar v. Queen-Empress*, I. L. R. 26 Calc. 786, *Choa Lal Dass v. Anant Pershad Misser*, I. L. R. 25 Calc. 233, and *Chandi Pershad v. Abdur Rahaman*, I. L. R. 22 Calc. 121, referred to. *Semble*: A title page in an account book containing the names of the partners and the amount of the capital contributed by each is, if signed by them, a "valuable security" within s. 30 of the Penal Code. *HARI CHARAN GORAIT v. GIRISH CHANDRA SADHUKHAN*, (1910) I. L. R. 38 Calc. ...

**Mahomedan Law—Dower—Possession**

—*Right of Widow to retain husband's property until dower debt is paid off.* Under the Mahomedan Law, when a widow is in possession of the undistributed property of her deceased husband, such possession having

**Mahomedan Law—concl'd.**

been obtained lawfully and without force or fraud, and her dower or any part of it is due and unpaid, she is entitled, as against the other heirs of her husband, to retain such possession until her dower debt is paid. The possession need not necessarily be possession obtained by an agreement with her husband or his heirs. *Bibi Tasliman v. Bibi Kasiman*, 12 C. L. J. 584, and *Amanat-un-nissa v. Bashir-un-nissa*, I. L. R. 17 All 77, dissented from. *SAHEB-JAN BEWA v. ANSARUDDIN*, (1911) I. L. R. 38 Calc. ...

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**Gift—Mushaa—**

Where the defendant made a gift of a four-anna share in a kaimi rayati holding to the plaintiff, his nephew by marriage, and admitted him to joint possession with himself, and recognized the plaintiff as being in such possession for 14 years:—*Held*, that he could not be allowed to say that there had been no valid gift. The doctrine of *mushaa* is not applicable to such a case. *Ibrahim Goolam Ariff v. Saiboo*, I. L. R. 35 Calc. 1, *Emnabai v. Hajirabai*, I. L. R. 13 Bom. 352, *Jivan Baksh v. Imtiaz Begam*, I. L. R. 2 All. 93, *Muhammad Mumtaz Ahmad v. Zubaida Jan*, I. L. R. 11 All. 460, referred to. *ABDUL AZIZ v. FATEH MAHOMED HAJI*, (1911) I. L. R. 38 Calc. ...

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**Maintenance Allowance—Attachment**

—*Maintenance to a person for lifetime and to her descendants—Assignment of decree for maintenance—Recurring charge—Validity of assignment in respect of arrears or future maintenance—Transfer of Property Act (IV of 1882) s. 6—Civil Procedure Code (Act XIV of 1882) ss. 232, 266—Civil Procedure Code (Act V of 1908), o. 21, r. 16.* Where a person is entitled to a monthly maintenance allowance under a deed, the allowance can be attached by an execution creditor only after it has become

**Maintenance Allowance—concl'd.**

due, that is to say, it cannot be attached prospectively before it has become due. *Kasheeshuree Debia v. Greesh Chunder Lahoree*, 6 W. R. Mis. 64, *Hari Das Acharjia v. Baroda Kishore Acharjia*, I. L. R. 27 Calc. 38, *Harris v. Brown*, I. L. R. 28 Calc. 621, referred to. Where a claim has been merged in an actual judgment, the right under the judgment is assignable, and the nature of the chose in action is generally immaterial. *Comegys v. Vasse*, 1 Peter 193, *Dugas v. Mathews*, 9 Georgia 510, *Charles v. Hoskins*, Iowa 329; 77 Am. Dec., 148, *Moore v. Howell*, 94 N. C. 265, *Stewart v. Lee*, 70 N. H. 181; 46 At. 31, referred to. Future maintenance awarded by decree when falling due can be recovered by execution of that decree without further suit, and hence the decree-holder in this case was entitled to recover in execution without further suit the allowance as it accrued due. *Ashutosh Bannerjee v. Lukhimon Debya*, I. L. R. 19 Calc. 139, referred to. *AJAD ALI MOLLAH v. HAIDAR ALI*, (1910) I. L. R. 38 Calc. ... 13

**Maintenance Grant:** See RENT ... 278

**Maintenance of Daughters:** See WILL ... 327

**Malicious Prosecution—Action on the case—Cause of action—Complaint laid, but no process issued—Criminal Procedure Code (Act V of 1898) ss. 202, 203—Defamation—Privilege.** Where a complaint had been laid before a Magistrate by the defendant against the plaintiff for criminal breach of trust, and the Magistrate had referred the matter to the Police under section 202 of the Criminal Procedure Code, for enquiry and report and finally dismissed the complaint under section 203 of the Criminal Procedure Code, without issuing process:—*Held*, that the prosecution had not commenced, and no suit for mali-

**Malicious Prosecution—concl'd.**

cious prosecution was maintainable. *Yates v. The Queen*, L. R. 14 Q. B. D. 648, and *Clarke v. Postan*, 6 C. & P. 423, referred to. Nor would there lie any action on the case analogous to malicious prosecution. *Held*, further, that the complaint, even if defamatory, was absolutely privileged. *GOLAP JAN v. BHOLANATH KHETTRY*, (1911) I. L. R. 38 Calc. ... 880

**Mandamus—Specific Relief Act (I of 1877), ss. 45, 46—Mandamus, writ of, on the Board of Revenue—Want of necessary party—Other legal remedy being available whether the Court will interfere.** A mandamus will never be granted to enforce the general law of the land which may be enforced by action. A having obtained a decree for recovery of possession of an estate against an infant under the Court of Wards, and the Collector of the District, representing that Court, applied during the pendency of an appeal by the defendants to the High Court, to the Members of the Board of Revenue forming the Court of Wards that the estate might be released in his favour. This application having been rejected A obtained a Rule from the Original Side of the High Court under s. 45 of the Specific Relief Act, calling upon the Members of the Board only to show cause why they should not forthwith release the estate. The Rule was not served upon the infant, whose interest would be affected if the Rule were made absolute:—*Held*, that inasmuch as the petitioner had failed to comply with Rule 483 of the Rules of the High Court, Original Side, by not serving the Rule upon the infant, and that inasmuch as he had an adequate legal remedy by way of execution of the decree obtained by him, the Rule was liable to be discharged, and the peti-

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<b>Mandamus—concl'd.</b>		<b>Mineral rights—concl'd.</b>	
tioner could not get any relief under s. 46 of the Act. <i>Held</i> , further, that unless the Court was satisfied that the doing of or forbearing from an act was consonant to right and justice, and such doing and forbearing was under any law for the time being in force clearly incumbent on the person against whom the order was sought, no <i>mandamus</i> ought to be granted; and that title to property would not be tried in <i>mandamus</i> proceedings and the writ would not issue when it was necessary to try or decide complicated or extended questions of fact. <i>KESHO PRASAD SINGH v. THE BOARD OF REVENUE</i> , (1911) I. L. R. 38 Calc. ... 553		ferred to. <i>Abhiram Goswami v. Shyama Charan Nandi</i> , I. L. R. 36 Calc. 1003, followed. <i>Sonet Kooer v. Himmud Bahadoor</i> , I. L. R. 1 Calc. 391; L. R. 3 I. A. 92, referred to. <i>Ishwar Shyam Chand Jiu v. Ram Kanai Ghose</i> , I. L. R. 38 Calc. 526, not followed. <i>Shama Charan Nandi v. Abhiram Goswami</i> , I. L. R. 33 Calc. 511, and <i>Megh Lal Pandey v. Rajkumar Thakur</i> , I. L. R. 34 Calc. 358, distinguished. <i>Brojanath Bose v. Durga Prosad Singh</i> , I. L. R. 34 Calc. 753, not followed and held to be practically overruled by <i>Hari Narayan Singh Deo v. Sriram Chakravarti</i> , I. L. R. 37 Calc. 723; L. R. 37 I. A. 136. <i>JYOTI PRASAD SINGH v. LACHIPUR COAL COMPANY</i> , (1911) I. L. R. 38 Calc. ... 845	
<b>Mandatory Injunction: See FOOTINGS</b> ... 687		<b>Mines—Coal mines—Royalty received by proprietor of estate from lessees of coal mines—Liability to Cess under Bengal Cess Act (Bengal Act IX of 1880) ss. 6 and 72—Return of "annual net profits" of Coal mines—Income-tax. Held</b> (upholding the decision of the High Court), that a royalty received by the appellant from person to whom he had leased a portion of his estate in Bengal for the purpose of working the coal mines situated therein, was, within sections 6 and 72 of the Bengal Cess Act (Bengal Act IX of 1880), part of the "annual net profits" of the mines, and that he had been properly assessed with cess on such royalty. The return required by s. 27 was not with regard to the mine-owner's profit, but had reference to the general net profits of the property. The fact that the obligation to make the return was laid on the person most cognizant of the circumstances under which the mine was worked and of the profits derived from it, did not alter the character of the royalty received by the proprietor for	
<b>Marriage: See HINDU LAW</b> ... 700			
<b>Marriage of Daughters: See WILL</b> ... 327			
<b>Marriage Settlement: See JEWISH LAW</b> ... 708			
<b>Mineral rights—Lease—Lessee for years or for life—Lessee in perpetuity—Intention of parties—Landlord's rights.</b> It is well settled in England that a tenant for life or for years has no right to work unopened mines. <i>Clegg v. Rowland</i> , 2 Eq. 160, and <i>Campbell v. Wardlaw</i> , 8 Ap. Cas. 641, referred to. <i>Gordon, Stuart &amp; Co. v. Tikaitnee Seobas Kowaree</i> , (1864) W. R. 370, not followed. <i>Prince Mahomed Buktyar Shah v. Rani Dhojmani</i> , 2 C. L. J. 20, and <i>Tituram Mukerji v. Cohen</i> , I. L. R. 33 Calc. 203, referred to. There is no difference in principle between a lessee for years and a lessee in perpetuity, when nothing is known or can be inferred about the intentions of the parties at the time of the inception of the lease. The landlord continues to have a reversion in mines discovered after the inception of the lease. <i>Kally Dass Ahiri v. Monmohini Dass</i> , I. L. R. 24 Calc. 440, re-			



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<b>Mines—concl'd.</b>		<b>Misjoinder—concl'd.</b>	
his share of the property of the mine. <i>MANINDRA CHANDRA NANDY v. SECRETARY OF STATE FOR INDIA</i> , (1910) I. L. R. 38 Cal.	372	and attempt at, cheating respectively; and if in the course of the same transaction A commits the separate offence, of criminal breach of trust, in furtherance of the conspiracy, to cheat, he may be separately charged for such offence at the same trial. <i>KALI DAS CHUCKERBUTTY v. EMPEROR</i> , (1911) I. L. R. 38 Cal.	453
<b>Minor:</b> See <i>CONSENT-DECREE</i> ...	639	<b>Mitakshara Law:</b> See <i>SUCCESSION CERTIFICATE</i> ...	182
—: See <i>GUARDIAN</i> ...	783	<b>Mortgage—Co-mortgagees—Appointment of a mortgagee as administrator to mortgagor's estate—Eatinguishment of debt—Parties—Suit by co-mortgagee's administrator against mortgagor's heirs instead of mortgagor's administrator—Improper frame of suit—Limitation—Proforma Defendant, transfer of—Limitation Act (XV of 1877) s. 22—Mortgagee administrator's right to interest.</b>	
<b>Mischief:</b> See <i>CRIMINAL TRESPASS</i> ...	180	A. S., the father of the two defendants, executed a mortgage bond in favour of A. J. repayable on the 16th October 1894. Subsequently A. S. executed a second mortgage in favour of A. A. and A. N. repayable on the 14th March 1896. A. J. transferred his security to A. A. and A. N. In 1896 A. S. died leaving an infant daughter and infant son, the present defendants, as heirs. In 1897 A. N. took out letters of administration to the estate of A. S., and was still acting as administrator when the present suit was instituted. In 1897 A. A. died and A. N. took out a succession certificate to collect the debts due to his estate. In 1902 the plaintiff took out letters of administration to the estate of A. A. On the 22nd October 1906, shortly before the expiry of 12 years from the date on which the first security was repayable, the plaintiff as administratrix brought the present suit for the recovery of Rs. 1,524 on both securities against the	
<b>Misjoinder:</b> See <i>COMMON CARRIER, LIABILITIES OF</i> ...	28		
— <i>Commission of criminal breach of trust in the same transaction as abetment of cheating and attempt to cheat and as a part of a common design—Joint trial of one accused under ss. 408 and 420 with another under ss. 421 of the Penal Code—Legality of separate sentences—Concurrent sentences—Criminal Procedure Code (Act V of 1898) s. 239. Where A, a railway ticket collector, made over two used tickets, which he had collected from passengers, to B, and instructed him to apply for a refund of the fares covered by the same, as unused tickets, at the place of issue, and the latter proceeded there and made such an application but was discovered in the act:—Held, that the joint trial of A on charges under ss. 408 and 420 and of B, under ss. 421 of the Penal Code, was legal under the provisions of s. 239 of the Criminal Procedure Code. Parmeshwar Lal v. Emperor, 13 C. W. N. 1089, distinguished. Subrahmanya Ayyar v. King-Emperor, I. L. R. 25 Mad. 61, referred to. Held, also, that A had committed two distinct offences in the same transaction and that separate sentences were not illegal, though concurrent sentences were, under the circumstances, more appropriate. Re Noujan, 7 Mad. H. C. R. 375, referred to. The two parts of section 239 of the Criminal Procedure are not mutually exclusive: so that if A induces B to cheat, and B attempts to do so, they may be tried together for abetment of,</i>			



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defendants, and joined A. N. as a *pro forma* defendant. A. N. showed that he was always ready to join the plaintiff, and on the 20th December 1906 his name was transferred from the category of defendant to that of plaintiff. *Held*, that the appointment of one of the mortgagees as administrator to the estate of the mortgagor did not extinguish the right of action of the mortgagee other than the one who was appointed administrator and had sufficient assets to satisfy his own share of the debt. The mortgagee administrator could not, however, maintain an action. *Wankford v. Wankford*, 1 Salkeld 299, *In re Carew*, 4 Ir. Ch. Rep. 112, *Harihar Pershad v. Bholi Pershad*, 6 C. L. J. 383, *Matson v. Dennis*, 4 DeG. J. & S. 345, *Vickers v. Cowell*, 1 Beav. 529 *Smith v. Sibthorpe*, 34 Ch. D. 732, *Powell v. Brodhurst*, [1910] 2 Ch. 160, *Steeds v. Steeds*, 22 Q. B. D. 537, *Morley v. Bird*, 3 Ves. 629, *Sitaram v. Shridhar*, I. L. R. 27 Bom. 292, *Tamman Singh v. Lachmin Kumari*, I. L. R. 26 All. 318, followed. *Binns v. Nichols*, L. R. 2 Eq. 256, *Dexter v. Arnold*, 3 Mason, 284, *Lowe v. Peskett*, 16 C. B. 500, *Barber Maran v. Ramana Goundan*, I. L. R. 20 Mad. 461, distinguished. *Richard v. Molony*, 2 Ir. Ch. Rep. 1, and *Wallace v. Kelsall*, 7 M. & W. 264, dissented from. *Held*, also, that the appointment of A. N. as administrator vested in him the estate of A. S. under s. 4 of the Probate and Administration Act, 1881, and the suit should therefore have been brought against him and not against the heirs. *Olegg v. Rowland*, L. R. 3 Eq. 368, *Beresford v. Ramasubba*, I. L. R. 13 Mad. 197, *Francis v. Harrison*, 43 Ch. D. 183, *Morley v. Morley*, 25 Beav. 253, distinguished. *Jaggewar Dutt v. Bhuvan Mohan Mittra*, I. L. R. 33 Calc. 425, referred

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**Mortgage—contd.**

to. The transfer of a party from *pro forma* defendant to plaintiff is not an addition of a new party within the meaning of s. 22 of the Limitation Act. *Nagendrabala Debya v. Tarapada Acharjee*, 8 C. L. J. 286, *Khadir Moideen v. Rama Naik*, I. L. R. 17 Mad. 12, followed. *Abdul Rahaman v. Amir Ali*, I. L. R. 34 Calc. 612, distinguished. *Pyari Mohun Bose v. Kedarnath Roy*, I. L. R. 26 Calc. 409, referred to. No interest should be allowed to a mortgagee administrator from the date when sufficient assets became available to him for repayment of the mortgage money. *Robinson v. Cumming*, 2 Atk. 409, *Page v. Lloyd*, 5 Peters 304, and *Adams v. Gale*, 2 Atk. 106, referred to. *Hossainara Begam v. Rahimannessa Begam*, (1910) I. L. R. 38 Calc. ... 342

—Whether suit is maintainable on prior mortgages without reference to subsequent mortgage over the same property—*Transfer of Property Act IV of 1882*, s. 85. A person having several mortgages over the same property is entitled to bring a suit on the earlier mortgages without joining in that suit his claim under the later mortgages. *Keshavram Dulavram v. Ranchhod Fakira*, I. L. R. 30 Bom. 156, *Dorasami v. Venkateshdayyar*, I. L. R. 25 Mad. 108, *Bhagwan Das v. Bhawani*, I. L. R. 26 All. 14, distinguished. *Nattu Krishnama Chariar v. Annangara Chariar*, I. L. R. 30 Mad. 353, referred to. *Gobind Pershad v. Harihar Charan*, (1910) I. L. R. 38 Calc. ... 60

—Preliminary mortgage decree—Application for sale of mortgaged property—*Limitation Act (IX of 1908)*, Sch. I., Arts. 181, 182 and 183. *Transfer of Property Act (IV of 1882)*, ss. 88 and 89—*Civil Procedure Code (Act V of 1908)* o. XXXIV, rr. 4 and 5; o. XLI, r. 20—Party,

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addition of. A preliminary mortgage decree under s. 88 of the Transfer of Property Act, 1882, does not require, and is not followed by any supplemental decree, but only, if necessary, by an application for an order absolute for sale under s. 89 of the Transfer of Property Act. Such an application is a petition for realization by the mortgagee of his decree, and is an application to enforce a judgment or decree, etc., within the provisions of Art. 183 of the Limitation Act, 1908. *Harendra Lal Roy Chowdhri v. Maharani Dasi*, I. L. R. 28 Calc. 557; L. R. 28 I. A. 89, referred to; *Madhab Mani Dasi v. Lambert*, I. L. R. 37 Calc. 796; 15 C. W. N. 337, discussed. It is a question for the Court in its discretion to determine in each case whether or not it will make an order for the addition of a party as contemplated by o. XLI, r. 20 of the Code of Civil Procedure, 1908. *AMLOOK CHAND PARRACK v. SARAT CHUNDER MUKERJEE*, (1911) I. L. R. 38 Calc. 913

—Sale—Purchase by mortgagee—Subsequent purchase by landlord—Mortgage-incumbrance—Mortgagee-purchaser, rights of, to fall back on mortgage—Sale under Bengal Tenancy Act—Ordinary Court-sale, its effect—Decree for rent against real tenant, effect of—Bengal Tenancy Act (VIII of 1885), ss. 164, 165 and 167. Where the mortgagee of a tenure purchased the mortgaged property in execution of a decree on his own mortgage, and the landlord subsequently purchased the same property in execution of a rent-decree but did not annul the mortgage-encumbrance:—*Held*, that the mortgagee-purchaser was entitled to fall back on his mortgage as a shield against the purchase by the landlord. *Akhoy Kumar Soor v. Bejoy Chand Mohatap*, I. L. R. 29 Calc. 813, followed and the *obiter dictum* in the case dis-

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cussed. *Bhawani Koer v. Mathura Prasad*, 7 C. L. J. 1, referred to. *Held*, further, that the landlord could not oust the mortgagee from the tenure without annulling the encumbrance under section 167 of the Bengal Tenancy Act, and this would be so even if the mortgagee had not proceeded to sale before the purchase of the landlord. Where the bidding for a tenure put up to auction under section 164 of the Bengal Tenancy Act did not reach the level of the decretal amount, and a sale of the tenure subsequently followed, but without a second proclamation as contemplated by section 165 of the same Act, the sale must be held to have been an ordinary court-sale and the purchaser to have acquired only right, title and interest of the judgment-debtor. *Nazir Mahomed Sirkar v. Girish Chunder Chowdhuri*, 2 C. W. N. 251, and *Akhoy Kumar Soor v. Bejoy Chand Mohatap*, I. L. R. 29 Calc. 813, distinguished. The special provisions for the sale of tenures under the Bengal Tenancy Act are a part of the public policy intended for the benefit of all parties concerned and the results of such sales are generally destructive of various derivative rights belonging to third parties not before the Court. The provisions of the Act are therefore very stringent, and if the landlord wants the special results provided for by the Act, he must proceed strictly in accordance with its provisions. Where a suit for rent has been rightly brought against the real tenant and a decree has been obtained, the decree is a good decree for rent, whether the tenant was recognised as such or not. *Lalun Monee v. Sona Monee Dabee*, 22 W. R. 334, and *Surnomoyee v. Denonath Gir Sunnyasee*, I. L. R. 9 Calc. 908, referred to. *BANBHARI KAPUR v. KHETRA SINGH ROY*, (1911) I. L. R. 38 Calc. ... 923

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<b>Mortgagee, purchase by:</b> <i>See</i> MORTGAGE ...	923

**Motor Car**—*Bengal Motor and Cycle Act (III of 1903), ss. 3 and 4—Use of Motor car with permission of the owner to convey his friends in his absence—Liability of Owner for the acts of his Driver in contravention of the rules framed under the Act—Rules 4, 20.* The owner of a motor car who expressly or impliedly permits his car to be used or driven by his servant is, if it is so used or driven as to contravene rule 20 of the rules framed under the Bengal Motor Car and Cycle Act (III of 1903), himself liable therefor under Rule 4 and s. 4 of the Act, though he was not in the car at the time and had given his servant general directions to observe the regulation speed, unless the latter has used it improperly for his own purposes. *Somerset v. Wade*, [1894] 1 Q. B. 574, *Somerset v. Hart*, 12 Q. B. D. 360, *Collman v. Mills*, 66 L. J. Q. B. 170, and *Commissioner of Police v. Cartman*, [1896] 1 Q. B. 655, referred to. *Thornton v. Emperor*, (1911) 1 L. R. 38 Calc. ... 415

**Mukhtear**—*Authority to practise in the Courts of Magistrates and Sessions Judges—Limitation of authority—Necessity of permission of the Court in each particular case—Grounds of permission—Criminal Procedure Code (Act V of 1898) ss. 4 (r), 340—Practice.* Under ss. 4 (r) and 340 of the Criminal Procedure Code, a mukhtear is, subject to the permission of the Court in each particular case, authorised to practise both before Magistrates and Sessions Judges. There is no general rule that mukhteers should be allowed to appear in every case in the Courts of Magistrates, and that they should not be permitted to

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appear in any case in the Courts of Session. The Magistrate and the Judge must decide in each case whether he will permit a mukhtear to appear. Though it is not desirable that mukhteers should be permitted to appear in Sessions Courts where their appearance is unnecessary, or where there is no reason for their appearance, the question is one which must be decided independently in each case, and no general rule can be laid down. It depends largely on whether the accused is in a position to employ a vakil or pleader and whether he elects to do so. But the defence of an accused should not be shut out merely by the fact that he is represented by a mukhtear. **ISHAN CHANDRA BHUTT v. EMPEROR**, (1911) 1 L. R. 38 Calc. ... 488

—*Dismissal from the roll on conviction of an offence implying moral turpitude—Application for re-instatement after a lapse of years—Deliberate omission to disclose the facts of enhancement of sentence and of an order directing his prosecution for making a false affidavit—Power of the High Court to re-instate a legal practitioner after disbarment—Grounds of re-instatement.* The High Court has power, when a legal practitioner has been dismissed for misconduct of any description, in the widest sense of the term, to re-admit him after a lapse of time, if he satisfies the Court that he has in the interval conducted himself honourably, and that no objection remains as to his character and capacity. *King v. Greenwood*, 1 W. Black. 222, *Anonymous case*, 17 Beav. 475, *In re Smith*, unreported, cited in 17 Beav. 477, *In re Robins*, 34 L. J. Q. B. 121, *In re Pyke*, 1 New Pract. Ca. 330, *In re Pyke*, 6 B. & S. 703; 34 L. J. Q. B. 121, *In re Pyke*, 34 L. J. Q. B. 220; 6 B. & S. 707, *In re Brandreth*, 60 L. J. Q. B. 501,

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*In re Barber*, 19 Beav. 378, *Boston Bar Association v. Greenwood*, 168 Mass. 169; 46 N. E. 568, *In re Palmer*, 9 Ohio C. C. 55, *In re Boone*, 90 Fed. 793, *In re Treadwell*, 114 Cal. 24; 45 Pac. 993, *In re King*, 54 Ohio 415; 43 N. E. 686, *In re Enright*, 69 Ver. 317; 37 Atl. 1046, *In re Burris*, 147 Cal. 370; 81 Pac. 1077, *In re Essington*, 32 Cal. 168; 75 Pac. 394, *In re Weed*, 30 Mont. 456; 70 Pac. 50, *In re Newton*, 27 Mont. 182; 70 Pac. 510, *In re Simpson*, 11 N. Dak. 526; 93 N. W. 918, *In re Sullivan*, 185 Mass. 426; 70 N. E. 441, *Incorporated Law Institute v. Meagher*, 9 Com. L. R. 655, *In re Pearson*, unreported, *In re Smith*, unreported, *In re Rupnath Banerji*, unreported, *In re Kally Prosonno Chatterjee*, unreported, *In re Nobin Krishna Mookerjee*, unreported, followed. *Ex parte Frost*, 1 Chitty 558, note, *In re Hawdane*, 9 Dowl. Pr. Ca. 970, *In re Garbett*, 18 C. B. 403, *In re Poole*, L. R. 4 C. P. 350, *In re Abinash Chandra Moitra*, I. L. R. 37 Calc. 173, *In re Chanda Singh*, 11 C. L. J. 438, 14 C. W. N. 521, and *Smith v. Justices of Sierra Leone*, 7 Moo. P. C. 174, referred to. *In re Lamb*, 23 Q. B. D. 477, distinguished. Where a Mukhtear was struck off the roll on conviction of kidnapping a minor girl, under s. 363 of the Penal Code, under circumstances of an aggravated character, implying moral turpitude, and applied after seven years for reinstatement, but deliberately omitted to disclose the facts that the High Court had enhanced his sentence and had also directed his prosecution under s. 193 of the Penal Code for making a false affidavit in the course of a proceeding in revision, the application for re-instatement was rejected. *In re AMIRUDDIN AHMED*, (1910) I. L. R. 38 Calc. ... 309

**Municipal Election—Bengal Municipal Act (III of 1884) ss. 6, 15,****Municipal Election—cont'd.**

103 and 105— *Voter, qualification of—Illegal levy of Income-tax and payment of Municipal rate, effect of—"Owner" meaning of—Property acquired by father with contribution from son.* A person whose income is below the taxable minimum, but who submits to the levy of the tax, does not thereby acquire the statutory qualification contemplated by section 15 of the Bengal Municipal Act. Similarly a person who is not legally liable to pay Municipal rate but pays it, does not become entitled to become a voter by the mere fact of such payment, unless it is proved to have been made by him as a person legally liable to satisfy the Municipal demand. An "owner" for the purposes of the Municipal Act includes not only an owner in the actual occupation of the holding but also an owner entitled to receive rent from the occupier or otherwise. It also includes a manager, or agent, or a trustee for any such person. Where a house was purchased in the name of the father, and the major portion of the consideration money was paid by the son out of joint funds belonging to himself and his brothers, and further the expenditure on subsequent extensive alterations and additions were similarly defrayed by the son out of the said funds, and the son was occupying the house while the father was living abroad: *Held*, that the son having a substantial interest in the property should be treated as owner in the ordinary acceptance of that term, and he being the manager or agent of the father could also be treated, as owner, and he was therefore liable under s. 103 of the Municipal Act to pay the rates assessed on the holding. *Held*, further, that where the son being in possession of the house paid the Municipal demands with his own money, it could not be said that such a payment was made by a

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- person neither liable nor competent to make it under the provisions of the law; he being an occupier was as such liable to pay the rates under s. 105 of the Bengal Municipal Act. *NARENDRA NATH SINHA v. NAGENDRA NATH BISWAS*, (1911) I. L. R. 38 Calc. ... .. 501
- Mushaa:** See MAHOMEDAN LAW—GIFT ... .. 518
- Mutation Proceedings:** See FALSE EVIDENCE ... .. 368
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- Notice of Suit:** See SECRETARY OF STATE FOR INDIA ... .. 797
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- Nuisance—Public and private nuisance—Erection of a high wall on one's own land very close to another's dwelling house—Likelihood of injury to the health of the inmates of the adjoining tenements and of the public inhabiting the neighbourhood by the propagation of disease—Propriety of order of partial demolition—Feasibility of other remedial measures—Calcutta Municipal Act (Beng. III of 1899) s. 632. The words "any nuisance" in s. 632 of the Calcutta Municipal Act mean any nuisance as defined in s. 3 (29) thereof. The definition, though wider than that of a "public nuisance" at the common Law, does not extend to the inclusion**

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- of all private nuisances. *Bhagwan Das v. Rash Behari Mullick*, 14 C. W. N. 637, explained. The erection of a wall, however high, on one's own land very close to the dwelling-house of a neighbour, in order to prevent him from acquiring a right of easement, is not in itself a nuisance under the Calcutta Municipal Act, but where the evidence shows that it is, or is likely to be, injurious to the health of the residents of the adjoining tenements and of the public inhabiting the neighbourhood, by propagating the seeds of consumption and typhoid, it becomes a nuisance under the Act. Where, however, the only matter which causes a wall to be a nuisance is not its height but the accumulation of filth at the bottom and want of space to clear the drainage between it and the adjacent house, the Magistrate, instead of ordering its reduction in height, should consider whether the nuisance cannot be abated by the adoption of other remedial measures. The use of the Act for the purpose of interfering in any way with the rights of private ownership, beyond the limited powers given to the Corporation by it for the necessary protection of the public and the enforcement of proper sanitation, is much to be deprecated. *Khagendra Nath Mitter v. Bhupendra Narain Dutt*, (1910) I. L. R. 38 Calc. ... 296
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- Offerings to Deity—Dispute concerning the possession of a temple and its offering—Offerings not "profits" arising out of a temple—Jurisdiction of Magistrate—Apportionment of the offerings—Criminal Procedure Code**

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(Act V of 1898) s. 145. Section 145 of the Criminal Procedure Code includes within its scope a dispute concerning the actual possession of a temple and the land on which it stands, but not one relating to the right to, and apportionment of, the offerings given by the worshippers. Such offerings are not "profits" arising out of the temple within the meaning of s. 145 (2). An order made under s. 145 declaring a party entitled to the actual possession of a temple and its offerings is, therefore, *intra vires* as to the temple, but not as to the offerings. *Guiram Ghosal v. Lal Behari Das*, I. L. R. 37 Calc. 578, referred to. *RAM SARAN PATHAK v. RAGHU NANDAN GIR*, (1911) I. L. R. 38 Calc. ... 387

**Official Trustee—Probate—Official Trustee's Act (Act XVII of 1864) ss. 8, 10, 32.** The Official Trustee as constituted by Act XVII of 1864 is not entitled by virtue of his office and in his character as Official Trustee and in the name of Official Trustee to obtain a grant of probate. *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653, referred to. *GREY v. CHARUSILA DAS*, (1910) I. L. R. 38 Calc. ... 53

**Official Trustee's Act (XVII of 1864), ss. 8, 10, 32: See OFFICIAL TRUSTEE** ... 53

**Onus of proof: See HINDU LAW—LEGAL NECESSITY** ... 721

**Owner, liability of: See BUSTEE LAND** 714

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**Partition, suit for: See HUSBAND AND WIFE** ... 620

**Procedure—Amendment of plaint by order of Court altering nature of suit—Acquiescence by plaintiff—Appeal, in disregard of amendment of plaint, not barred.** It is incum-

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bent on the Court, in a suit for partition, to come to a clear and definite finding that the plaintiff had title to the property, before proceeding further into the case, and a judge on appeal should also observe the same procedure. *Bidhata Rai v. Ram Charitar Rai*, 12 C. W. N. 37, referred to. If the Judge, on appeal, finds the question of title to the property in favour of the plaintiff, any finding on the question of possession does not debar the Judge from affirming the preliminary decree for partition passed by the first Court and does not justify him in remanding the case to the lower Court for retrial. At the hearing of the appeal, the Judge held that the plaint should be amended and the plaint was accordingly amended with the acquiescence of the plaintiff, so as to alter the nature of the suit. A fresh written statement was filed by the defendant and fresh issues were framed. These facts did not preclude the plaintiff from filing an appeal, within the time allowed by limitation, "if, on reflection, he thought that the action taken by him in amending the plaint was injudicious. *SHASHI BHUSAN BEED v. JOTINDRA NATH ROY CHOWDHRY*, (1911) I. L. R. 38 Calc. ... 681

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<b>Political Agent at Sikkim, Court of</b> — <i>Execution of decree—Transfer</i> <i>of decree for execution—Civil</i> <i>Procedure Code (Act XIV of</i> <i>1882), s. 229A; (Act V of 1908)</i> <i>ss. 43, 45. By the notifications</i> <i>of the 29th March, 1889, and 3rd</i> <i>October, 1907, the Governor-</i> <i>General in Council declared that</i> <i>s. 229A of the Code of Civil Pro-</i> <i>cedure of 1882 (s. 45 of the Code</i> <i>of 1908) should apply to the</i> <i>Court of the Political Agent at</i> <i>Sikkim. A decree obtained in</i> <i>the Court of the Political Agent</i> <i>at Sikkim and transferred for</i> <i>execution to a Court in British</i> <i>India, could therefore be exe-</i> <i>cuted within the jurisdiction of</i> <i>that Court. ZAMIL AHMED v.</i>	

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*of the third Judge on difference*  
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*the whole case against an accus-*  
*ed—Criminal Procedure Code*  
*(Act V of 1898), s. 429. The*  
*definition of a “newspaper” in*  
*s. 2 (1) (b) of Act VII of 1908*  
*must be read as a whole. It re-*  
*fers to a work which publishes*  
*periodically public news or com-*  
*ments thereon. It is not enough*  
*to take a single issue of it, and*  
*to pick out an isolated sen-*  
*tence or a paragraph therein*  
*which might by stretch of lan-*  
*guage be interpreted to con-*  
*tain public news or comments*  
*thereon. When it is disputed*  
*whether a work is a “news-*  
*paper” the prosecution ought to*  
*establish its alleged character*  
*by proof of the contents of more*  
*than one issue. To bring a case*  
*under s. 3 (1) of the Act the cha-*  
*acter of the offending paper*  
*as a “newspaper” has to be first*  
*established, and this may not*  
*always be possible by the produc-*  
*tion and proof of the contents*  
*of one issue only. In a proceed-*  
*ing under s. 3 of the Act the*  
*newspaper and the offending*  
*matter must be regularly prov-*  
*ed. In such cases it is essential*  
*that the proceedings should be*  
*regularly conducted and the*  
*forms of law observed. Section*  
*3 (1) of the Act confers very li-*  
*imited powers of forfeiture and*  
*applies only to the cases of*  
*presses used for the printing of*  
*newspapers which contain an in-*  
*citement to the particular*  
*crimes or class of crimes specified*

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therein. The word "incitement" clearly implies the idea of rousing to action, instigation or stimulation. The use of seditious language, sufficient to bring the case under s. 124A of the Penal Code, is not equivalent to an incitement to offences mentioned in s. 3 (1) of Act VII of 1908. A thinly veiled glorification of rebellion implying a desire on the part of the writer that there should be a successful rebellion, though it may amount to sedition under s. 124A of the Penal Code, is not sufficient to bring the case within s. 3 (1) of the Act. There must be something more direct and specific for that purpose. In the case of two prisoners, regarding the guilt of one of whom only the Judges of the Appellate Court are divided in opinion, it may be that what has to be laid before another Judge is the case of such prisoner alone. But where they are equally divided as to the guilt of one accused, though in certain aspects they may be agreed, the whole case as regards the accused is laid before the third Judge, and not merely the point or points on which there is a difference of opinion, and it is his duty to consider all the points involved before delivering his opinion upon the case. <i>SARAT CHANDRA MITRA v. EMPEROR</i> , (1910) I. L. R. 38 Calc. ...	202
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**Review in Criminal Cases—concl'd.**

a point of law and a misapprehension of the facts in connection therewith, to review its judgment before it has been signed. *In the matter of the petition of Gibbons*, I. L. R. 14 Cal. 42, *Queen-Empress v. Lalit Tiwari*, I. L. R. 21 All. 177, referred to. *Queen-Empress v. Fox*, I. L. R. 10 Bom. 176, dissented from. Where a Magistrate, after some of the prosecution witnesses had been heard by another Bench of Magistrates, discharged the accused because the other witnesses were not present, the High Court set aside the order of discharge and directed him to dispose of the case after argument with reference to the evidence already on the record. *AMODINI DASEE v. DARSAN GHOSE*, (1911) I. L. R. 38 Cal. 828

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 —Liability of auction-purchaser in respect of payment of arrears of revenue—Appropriation of payment to particular kist, and acceptance and acknowledgment of Treasury Officer—Subsequent appropriation by Treasury Officer to earliest kist—Sale for arrears so created, suit to set aside—Contract Act (IX of 1872) ss. 59, 60. Where the

**Sale for Arrears of Revenue—concl'd.**

proprietor of an estate made a payment in respect of arrears of revenue, and in the document which accompanied the payment to the Government, expressly appropriated it to the satisfaction of a particular kist, and the money was accepted and acknowledged by the Treasury Officer as paid on that account: *Held*, it was not in the power of one of the parties to the transaction, without the assent of the other, to vary the effect of transaction by altering the appropriation in which both originally concurred. After a payment had been so specially appropriated and accepted as paid in respect of a kist due in January 1902, the Treasury Officer applied part of it to the satisfaction of an earlier kist due in September 1901, and only paid the remainder towards the January kist, with the result that an arrear was created in the January kist to which the payment had been wholly appropriated, and a sale took place for such arrear. In a suit to set aside the sale:—*Held* (reversing the decision of the High Court), that no arrears in respect of the January kist were really due at the date of the sale which was therefore without jurisdiction and invalid. *Sem-ble*: Sections 59 and 60 of the Contract Act (IX of 1872), relating to the appropriation of payments might have been applicable to the case, if the parties to the transaction had not by their own actions placed the matter beyond doubt. *MAHOMED JAN v. GANGA BISHUN SINGH*, (1911) I. L. R. 38 Cal. 537

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**Search without Warrant—Power of the police to search the house of an absconding offender gener-**



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**Search without Warrant—concl'd.**

ally for stolen property on information of dacoity against him—*Legality of Search—Criminal Procedure Code (Act V of 1898) ss. 94 and 165—Rioting—Common object to resist such search—Right of private defence—Penal Code (Act XLV of 1860) ss. 99, 147, 323, 353.* Section 165 of the Criminal Procedure Code does not authorize a general search for stolen property in the house of the absconding offender, against whom an information has been laid of having committed a dacoity. It refers only to specific documents or things which may be the subject of a summons or order under s. 94 of the Code, and the latter does not extend to stolen articles or any incriminating document or thing in the possession of the accused. *Ishwar Chandra Ghosal v. Emperor, 12 C. W. N. 1016, referred to.* Where a Sub-Inspector, on receiving information of the commission of a dacoity, searched the house of one of the alleged offenders, accompanied by the complainant and the village officers, but without a search warrant, whereupon they were beaten by the petitioners who were charged with, and convicted of, rioting, with the common object of resisting the search, assault and causing hurt, under ss. 147, 323 and 353 of the Penal Code:—*Held*, that the search was illegal, and that the common object having failed, the conviction under s. 147 was bad. *BAJRANGI GOPE v. EMPEROR, (1910) I. L. R. 38 Calc.*

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<b>Second Appeal: See APPEAL</b>	339
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—*Lia-*

bility in respect of Contract of service—Pay and Pension—Cause of action—Pensions Act (XXIII of 1871) s. 4. The plaintiff, who was in the Educational Department drawing a salary of Rs.

**Secretary of State for India—concl'd.**

150 a month, was in 1881 employed by the Government on special duty under an agreement, one of the terms being "from the 1st September, 1881, his pay will be raised during good behaviour to Rs. 300 a month." It was assumed that this meant "for the term of his natural life." The special duty was completed, but the plaintiff, in spite of his protests was retained on deputation till 1902, when he was made to revert to the Educational Department and was retired in 1904. Since or from shortly before his retirement he was paid only Rs. 150 a month. In an action instituted by the plaintiff against the Secretary of State for a declaration that he was entitled to be paid Rs. 300 a month for his natural life, and for arrears on the basis of that figure:—*Held*, that the plaintiff must be taken to have treated the whole of his service under Government as one service, and that anything payable to him after the termination of that service was in the nature of a "pension" within the meaning of section 4 of the Pensions Act of 1871, and hence the suit was not maintainable. *SARAT CHANDRA DAS v. SECRETARY OF STATE FOR INDIA, (1910) I. L. R. 38 Calc.*

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**"Offences involving breach of the peace"—Acts of high-handedness not accompanied with actual breaches of the peace—Liability of zemindar for acts of his nabib and lathials committed in his interest—Abetment of offences involving a breach of the peace—Criminal Procedure Code (Act V of 1898) s. 110 (e). Evidence of acts falling within the**



**Security for good Behaviour—concl'd.**

scope of s. 110 of the Criminal Procedure Code, but committed several years before the date of the institution of the proceedings thereunder, is admissible. *Wahid Ali Khan v. Emperor*, 11 C. W. N. 789, followed. To bring a case within the section a person must be found to have habitually committed, attempted to commit or abetted the commission of, offences of which a breach of the peace is an ingredient. *Arun Samanta v. Emperor*, 1 L. R. 30 Calc. 366, followed. Where the only conviction against a zemindar was one under s. 150 of the Penal Code and there was evidence that he with his lathials (or his servants acting under his orders), took articles of food from bazar vendors, that he assembled lathials to enforce the performance of *pūja* by his own *purohit*, threatened a witness with violence for deposing against him, and, with his lathials, uprooted some trees, cut the crops of his opponents, molested rival fishermen in boats and attempted to stop a marriage procession, but no breach of the peace was committed or complaint made by the opposite party:—*Held*, that such acts did not involve a breach of the peace so as to support a charge of habitually committing offences within cl. (e). But where the zemindar's naib had led several riots in his master's interest and had been convicted in several such cases, and there was evidence that certain lathials were always employed to help his cause:—*Held*, that he had habitually abetted the commission of offences mentioned in that clause. *Kasi Sundar Roy v. Emperor*, 1 L. R. 31 Calc. 419, followed. A Magistrate should be careful to see that s. 110 is not employed by private persons to wreak vengeance under theegis of a Crown prosecution. *KALI PRASANNA BOSE v. EMPEROR*, (1910) 1 L. R. 38 Calc. ...

**Sedition—Attack on rival political party but not on Government established by law in British India—Limits of legitimate criticism of acts and measures of Government—Construction of letter or article in a newspaper—Admissibility of articles in other issues not forming the subject of the charge when the identity of the writer is not proved—Penal Code (Act XLV of 1860) s. 124A—Evidence Act (I of 1872) s. 15—Liability of registered printer and publisher—Printing Presses and Newspapers Act (XXV of 1867) s. 7.** A letter or an article in a newspaper containing an attack on a rival political organization and not on the Government established by law in British India, is not seditious within the meaning of s. 124A of the Penal Code. A man may criticise or comment on any act or measure of the Government legislative or executive, and freely express his opinion on it. He may express the strongest condemnation of such measures, and he may do so severely and even unreasonably, perversely or unfairly provided he does not, whether in his comments on measures or not, hold up the Government itself to hatred and contempt. *Queen-Empress v. Bal Gangadhar Tilak*, 1 L. R. 22 Bom. 112, approved of. It is not sedition for a writer to describe the Reform Scheme as being monstrous and misbegotten, because it is not founded on democratic principles and not a genuine reform or a genuine initiation of constitutional progress, or to assert that some of the police officials and the judiciary are corrupt, unscrupulous and partial, or to state that if an organisation which he believes to be lawful is suppressed by proclamation it is arbitrary, and that in such case the responsibility will not rest on him for the madness which crushes down open and legal political activity in order to give a des-

**Sedition—contd.**

perate and sullen nation into the hands of fiercely enthusiastic and unscrupulous forces, or to inculcate the doctrine of passive resistance or refusal of co-operation with the Government within legal limits, or to describe the British Courts in India as ruinously expensive. In construing a newspaper article its meaning must be taken from the article as a whole and not from isolated passages. Words and expressions such as *arbitrary executive* must not be looked at as if the writer was a constitutional lawyer instead of a journalist. *Queen-Empress v. Bal Gangadhar Tilak*, I. L. R. 22 Bom. 112, approved of. Articles not forming the subject of the charge and appearing in other issues of the same paper, are not admissible to show the intention of the writer in the article complained of in the absence of proof of his identity. The declared printer and publisher of a letter or article in a newspaper is amenable to the law merely on proof that it is calculated to excite feelings of disaffection, hatred or contempt against the Government, but the prosecution must prove either that the writer does in fact excite such feelings or that his intention was to do so. The writer of an article may be guilty of sedition no matter how guardedly he attempts to conceal real object, but the registered printer and publisher cannot be punished if the concealed object is not established by the evidence on the record. *Queen-Empress v. Amba Prasad*, I. L. R. 20 All. 55, referred to. *MANOMOHAN GHOSE v. EMPEROR*, (1910) I. L. R. 38 Calc.

—*Liability of declared printer and publisher of a newspaper for seditious matter appearing therein—Absence during the period of the publication of the seditious articles, bona fides not made out—Printing Presses and Newspapers Act (XXV of 1867)*

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**Sedition—contd.**

s. 7. The declared printer and publisher of a newspaper containing seditious articles is responsible for them unless he makes out, on sufficient evidence, that he had in fact nothing to do with them. Where the editor of a newspaper was convicted and sentenced under s. 124A of the Penal Code, and the accused made his declaration as printer and publisher, thereafter, and continued so to act after the editor had resumed work on release from jail, and further allowed his name to appear as such, though he was absent from the town of publication of the paper when certain seditious articles appeared therein and engaged during the period in his own private business without taking any interest in the paper, it was held that he had not made out the *bona fides* of his absence, and was, therefore, legally responsible for the articles. *SURENDRA PRASAD LAHIRI v. EMPEROR*, (1910) I. L. R. 38 Calc. ... 227

—*Wholesale imputation of bribery against ministerial and police officers and of neglect on the part of Government to inquire into such abuses—Attempt to promote enmity between different classes—Inveighing against Hindus and Mahomedans alike—Penal Code (Act XLV of 1860) ss. 124A and 153A—Convictions at one trial under ss. 124A and 153B of the Penal Code—Appeal to the High Court—Criminal Procedure Code (Act XLV of 1860) ss. 124A and 153 V of 1898) ss. 35 (3), 408 prov. (c). A single expression that the people of Bengal are trodden under the feet of outsiders used incidentally in a newspaper article, otherwise innocuous, does not constitute the whole seditious. An article imputing wholesale bribery to the ministerial officers of the Law Courts and to the lower officers of the*

**Sedition—*concl'd.***

police force, and expressing grave doubts as to whether the Government ever inquire into such abuses, so much is it occupied with investigations of boycott, dacoity and sedition, published when sedition is rife and the minds of people excited, may have the effect of creating a feeling that the Government is not doing its duty, and exceeds the limits of fair comment and is seditious, irrespective of the question of the truth of the allegations. Where the writer of an article inveighed both against the Babus and Meahs as professing brotherhood with the poor Mahomedan ryots and then robbing them, and referred to the alleged conduct of Christian missionaries towards their converts, by way of illustration, without any deliberate attempt to excite one class against another, the conviction under s. 153A of the Penal Code was set aside as bad in law. *Per* RICHARDSON J. If a particular article is charged as being seditious on the ground that it says more than appears on the face of it, it is the duty of the prosecution to show that it has, in fact, the guilty meaning or intent attributed to it. *Semble*: An appeal lies under ss. 35 (3) and 408, prov. (c), directly to the High Court from a conviction and separate sentences under ss. 124A and 153A of the Penal Code passed on the same trial. *JOY CHANDRA SARKAR v. EMPEROR*, (1910) I. L. R. 38 Cal. 214

**Separate Sentences, legality of:** *See* MISJOINDER ... 453

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**Specific Performance—Denial of execution of agreement by defendant—Conflicting evidence as to**

**Specific Performance—*concl'd.***

*genuineness of signature—Consideration as to which story best agrees with admitted facts—Defendant in pecuniary difficulties—Plaintiff in a position to "dominate his will"—Bargain onerous but not unconscionable—Absence of fraud or misrepresentation by plaintiff—Discretion in granting or refusing specific performance.* In a suit to enforce specific performance of an agreement dated 4th April, 1906, for the sale of land, in which the defendant (appellant) denied that he ever signed the agreement, the evidence on that point was conflicting, though otherwise there was much unanimity on the general facts. The two lower Courts (of the Chief Court of Lower Burma) differed, the Original Court holding that the defendant's signature was a forgery, and the Appellate Court reversing that decision and making a decree for specific performance. *Held*, by the Judicial Committee, that the proper course was to examine the admitted facts and circumstances as furnishing the safest guide to a correct conclusion. On this test their Lordships were of opinion that the plaintiff's (respondent's) account of the transaction best fitted in with the admitted facts and that the defence was untrue. The defendant, when he acquired the land in 1901, was admittedly in pecuniary difficulties, and had bought it with money raised by mortgaging it. In 1905 his mortgagee was pressing for payment, and another creditor had taken out execution. The arrangement he was obliged to make with the plaintiff was, therefore, necessarily of a somewhat onerous nature. *Held*, that in the absence of any evidence of fraud or misrepresentation on the part of the plaintiff, which induced the defendant to enter into the contract, or that the plain-

**Specific Performance—concll.**

tiff under the circumstances took  
took an improper advantage of  
his position or the difficulties  
of the defendant, and having  
regard to the character of the  
agreement, which, in their  
opinion, though onerous, was  
not unconscionable, their Lord-  
ships saw no reason, in the exer-  
cise of their discretion, for  
refusing to grant specific perform-  
ance. The decree of the Appel-  
late Court was therefore upheld.  
DAVIS v. MAUNG SHWE GOH,  
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13; o. V, r. 17—*Ex parte* decree  
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ing—"Reside," meaning of—  
Limitation Acts (XV of 1877)  
Sch. II, Art. 164 and Act IX of  
1908, Sch. I, Art. 64—Know-  
ledge of the decree. The term  
"residence" is not identical  
with "ownership." In o. V,  
rules 9 and 17 of the Code of  
Civil Procedure, 1908, it means  
the place where a person eats,  
drinks and sleeps, or where his  
family or servants eat, drink and  
sleep. Under o. V, rule 17, a  
substituted service can be justi-

**Substituted Service—concll.**

fied only when it is shown that  
proper efforts were made to  
find the defendant. Where a  
defendant was not found in his  
ancestral family house, and there  
was no one present upon whom  
a summons could be served, in  
fact he was working in a  
different district and living  
there for some years), a substi-  
tuted service by affixing a copy  
of the summons at the outer  
door of the family house was  
not justified under the law.  
An Original Court can enter-  
tain an application to set  
aside an *ex parte* decree though  
an appeal by the contesting de-  
fendants is pending in the  
Appellate Court. *Sarat Candra  
Dhal v. Damodar Manna*, 12  
C. W. N. 885, followed. The  
period of limitation under Art.  
164 of Sch. I of the Limitation  
Act (IX of 1908) runs from the  
date when the defendant has  
knowledge of the particular  
decree which is sought to be set  
aside. *KUMUD NATH ROY CHOW-  
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CHOWDHURY*, (1911) I. L. R. 38  
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**Succession Certificate—Mitakshara  
Law—Impartible Estate—Arrears  
of rent converted to a bond—  
Debt due to last holder of im-  
partible estate if "effects of the  
deceased" in the hands of the  
successor—Succession Certificate  
Act (VII of 1889), s. 4. Where  
in lieu of arrears of rent a bond  
was given to the holder of an  
impartible estate:—*Held*, that  
the debt due is not, in the hands  
of the successor to the estate, a  
part of the effects of the deceased  
within the meaning of section  
4 of the Succession Certificate**

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**Succession Certificate—concl'd.**

Act, but is in its nature, a family debt accruing to him by right of survivorship. *Jagmohandas Kila-bhai v. Allu Maria Duskal*, I. L. R. 19 Bom. 338, *Beejraj v. Bhagopersaud*, I. L. R. 23 Calc. 912, *Bissen Chand Dudhuria Bahadur v. Chatrapat Sing*, 1 C. W. N. 32, *Katama Natchar v. The Rajah of Shivagunga*, 9 Moo. I. A. 539, 2 W. R. P. C. 31, *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora*, 13 Moo. I. A. 333, referred to. *GUR PERSHAD SINGH v. DHANI RAI*, (1910) I. L. R. 38 Calc. ... 182

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**Trade-mark—Trade-name—Assignment—Goodwill—Infringement.**

Where a cigarette manufacturer, carrying on only one business and being the proprietor of several trade-marks which he used indiscriminately, purported to assign cigarette manufacturer "all that the trade-mark, name and label known as the 'Sri Durga' trade-mark, used upon packets of cigarettes sold and known as 'Sri Durga' cigarettes and the goodwill of his business so far as the same relates there-

**Trade-mark—concl'd.**

to," and continued dealing in his cigarettes under the other marks:—*Held*, that the assignment was void and inoperative. For the assignment of a trade-mark to be operative in law, it is not sufficient that an assignment of goodwill should accompany or follow the transfer of the trade-mark, so as literally to comply with the rule that a trade-mark cannot be transferred in gross, but the trade-mark must continue to be a representation of the truth, as warranting the origin of the goods to which it is attached, within the limits of deviation sanctioned by the usage of trade and commerce. *Leather Cloth Company v. American Leather Cloth Company*, 11 H. L. 523, *Hall v. Barrows*, 4 DeG. J. & S. 150, *Singer Manufacturing Company v. Wilson*, L. R. 2 Ch. D. 434, *Singer Manufacturing Company v. Loog*, L. R. 8 A. C. 15, *Pinto v. Badman*, 8 R. P. C. 181, and *Edwards v. Dennis*, L. R. Ch. D. 454, referred to. *BRITISH AMERICAN TOBACCO Co., Ltd. v. MAHBOOB BUKSH*, (1910) I. L. R. 38 Calc. ... 110

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— **s. 85: See MORTGAGE** ... 60

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Vendor, and Purchaser—Contract of Sale—Breach by Vendor—Loss of bargain—Liability of vendor—Transfer of Property Act (IV of 1882) s. 55 (1) (g)—Measure of damage. The owners of certain immoveable property, which was under a mortgage, entered into a contract for the sale of the property, but subsequently declined to complete the sale, on the ground of the existence of the mortgage. Thereafter the property was acquired, under the Land Acquisition Act, by the Local Government; and the compensation paid to the owners, including the statutory allowance of 15 per cent., far exceeded the contract price. On a suit brought by the purchaser for damages for breach of the contract of sale:— <i>Held</i> , that the vendors were bound to convey the property free from incumbrances, and the existence of the mortgage was no defence to the purchaser's action. <i>Engell v. Fitch</i> , L. R. 4 Q. B. 659, <i>Day v. Singleton</i> , [1899] 2 Ch. 320, <i>Jones v. Gardiner</i> , [1902] 1 Ch. 195, referred to. <i>Flureau v. Thornhill</i> , 2 W. Bl. 1078, <i>Bain v. Fothergill</i> , L. R. 7 E. & I. App. 158, distinguished. <i>Semble</i> : The ruling in <i>Bain v. Fothergill</i> , L. R. 7 E. & I. App. 158, does	

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not apply to India, and there is no exception to section 73 of the Indian Contract Act, in the case of sale of immoveable property. *Ranchhod v. Manmohan Das*, I. L. R. 32 Bom. 165, and *Pitambar Sundarji v. Cassibai*, I. L. R. 11 Bom. 272, referred to. The measure of damage was the difference between the contract price and the compensation allowed to the vendors, excluding, however, the statutory allowance of 15 per cent., inasmuch as the breach had occurred before the acquisition. *NABINCHANDRA SAHA PARAMANICK v. KRISHNA BARANA DAS*, (1911) I. L. R. 38 Calc. ...

Vendor and Sub-vendee—*Estoppel*—Unpaid Vendor—Appropriation—Jute trade, usage of—Pucca delivery orders—Negotiability—Documents of Title—Indian Contract Act (IX of 1872) s. 108—Transfer of Property Act (IV of 1882) s. 137—Damages. A delivery order is recognised as a document of title under section 108 of the Contract Act and section 137 of the Transfer of Property Act, and under a delivery order the transferee acquires a title to the goods to which it relates. By the usage of the jute trade in Calcutta, pucca delivery orders are issued only on cash payment, are passed from hand to hand by endorsement, and are sold and dealt with in the market as absolutely representing the goods to which they relate. On the 1st March, 1909, the defendant company sold to J. & Co.'s principals certain Hessian cloth on the terms that "payments were to be made in cash in exchange for delivery order on sellers, and delivery of the goods was to be given and taken ready payment against pucca delivery order." A pucca delivery order was issued on the 2nd March by the defendant company in favour of J. & Co.'s principals or order, embodying the terms "ready



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shipment." On the 3rd March J. & Co. requested the plaintiffs to advance money on the security of the delivery order. The plaintiffs on making enquiries at the mills were informed the delivery order was "all right." On the 4th March J. & Co. obtained an advance of money from the plaintiffs on the pledge of the delivery order and duly endorsed the delivery order to the plaintiffs. On the same date J. & Co. handed the defendant company a cheque in payment of the goods comprised in the delivery order. On the 8th March the defendant company presented the cheque for payment, but it was dishonoured. The defendant company thereupon refused to give delivery of the goods to the plaintiffs under the delivery order. The plaintiffs obtained an absolute release of all J. & Co.'s interest in the delivery order, and brought an action against the defendant company for delivery of the goods or their value or damages for conversion. <i>Held</i> , that the defendant company were estopped from denying that cash had been paid for the goods to which the delivery order related and they could not claim to be entitled to a lien against the plaintiffs. The defendant company were further estopped from denying that they had appropriated goods of the required quantity and description to the delivery order, and that they held these goods for the plaintiffs. <i>Goodwin v. Roberts</i> , L. R. 1 A. C. 476, referred to. <i>ANGLO-INDIA JUTE MILLS Co. v. OMADÉMULL</i> , (1910) I. L. R. 38 Calc. ...	127
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<b>Warrant—Witness—Rescuing from lawful custody—Warrant against a witness issued in the first instance without recording reasons in writing—Legality of warrant and arrest—Penal Code (Act XLV of 1860) s. 225 B—Criminal Procedure Code (Act V of 1898) s. 90, Sch. V, Form VII—Practice.</b> The issue of a warrant of arrest by a Magistrate against a witness in the first instance, drawn up in the terms of Form VII of Schedule V of the Criminal Procedure Code, but without recording his reasons in writing therefor, as required by s. 90 of the Code, is illegal; and a person rescuing the witness arrested on such warrant is not guilty of an offence under s. 225B of the Penal Code. <i>SUKHESWAR PHUKAN v. EMPEROR</i> , (1911) I. L. R. 38 Calc. ...	789
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<b>Will—Construction of Will—Clause for Maintenance of Daughters—Succession Act (X of 1865) ss. 111, 187—"Uncertain event"—Marriage of daughters—Legatee, right of, to sue—Succession Act s. 3—"Probate" of Will obtained only after institution of suit—Grant of Probate, modified by High Court on appeal.</b> A Hindu died in 1879, leaving a will, whereby (among other things) he made provision for his wives and his daughters who survived him. The clause providing for the daughters was: "When they will be married, and if they desire to live in separate houses, the person in whose management	

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my property will be at the time will make separate houses for them in the vicinity of my house from the income of my property. For the maintenance of my daughters I fix an allowance of Rs. 600 a year for Srimati Prasanna, and Rs. 600 for Srimati Sarat. As long as the daughters will live in the separate houses in this place they will get the fixed allowances, respectively, but if the daughters do not live in this place, they will get Rs. 10." The daughters married in 1888 and 1889 respectively, and lived in separate houses. In suits for their allowances it was contended that the bequests to them were given in the "uncertain event" of their marriage, and as that event did not happen until after the death of the testator, the bequests were void by reason of s. 111 of the Succession Act (X of 1865) and never took effect. *Held*, on the construction of the above clause, that the payment was not contingent on the daughters' marriages, and that therefore s. 111 was not applicable. At the time the suits were instituted, no letters-of-administration had been granted, but pending the suits the widow obtained from the District Judge a grant of letters-of-administration with the will annexed. The grant was, on appeal, modified by the High Court by limiting it to the realisation of the maintenance allowance provided by the will for the widow; but before the letters-of-administration could be recalled and altered, the widow died and the letters were never formally altered. It was contended that the suits could not be maintained with reference to s. 187 of the Succession Act which requires that before the right of a legatee can be established "probate of the will shall have been granted." *Held*, that the grant of administration with the will annexed was, within the meaning of s. 3

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of the Act, a grant of "probate" which was a compliance with the provisions of s. 187. The subsequent limitation of the grant was immaterial. So long as the compliance with the section was prior to decree, the fact that it was after the institution of the suits made no difference and the Court was fully competent to deal with the suits. CHANDRA KISHORE ROY v. PRASANNA KUMARI DAS, (1910) I. L. R. 38 Calc. ... .. 327

—*Execution of will—Proof of capacity of testator to execute will*  
 —*Undue influence—Evidence of exercise of such influence—Absence of evidence of any coercion*  
 —*Question of fact, whether property was ancestral or acquired*  
 —*Concurrent decisions of fact.*  
 In this case the question was as to the capacity of a testator to execute a will propounded by the appellants; and it was alleged that they had exercised undue influence over him in the matter of the execution whilst he was admittedly very seriously ill, though the evidence was to the effect that he was in possession of his senses and understood what he was doing when he signed the will. *Held* (reversing the decision of the Chief Court of the Punjab, that, so far as the charge of exercising undue influence was concerned, all that was shown by the respondents who were attacking the will was that there was motive and opportunity for the exercise of such influence by the appellants, and that some of them in fact benefited by the will to the exclusion of other relatives of equal or nearer degree. Circumstances of that character might suggest suspicion, and would certainly lead the Court to scrutinise with special care the evidence of those propounding the will. But, in order to set it aside, there must be clear evidence that the undue influence was in fact exercised

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or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property. Such evidence was not only lacking in the case, but in the opinion of their Lordships of the Judicial Committee, the circumstances attending the making and execution of the will were not reasonably consistent with it. *Held*, also, that, under the circumstances, the evidence as to capacity was not displaced by mere proof of serious illness and of general intemperance, and that the appellants had discharged the onus which lay on them of proving that the will was duly executed by the testator while in his proper senses. The question whether property was ancestral or not, was held to be substantially one of fact, and therefore subject to the usual practice of their Lordships not to interfere where two Courts

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had concurrently found it was not ancestral but self-acquired.  
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